# Petition and Transcript of Record

## Supreme Court of the United States

OCTOBER TERM, 1930

## No. 400

MASCOT OIL COMPANY, INC., PETITIONER,

*vs.*

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 27, 1930

CERTIORARI GRANTED OCTOBER 27, 1930

**(35,322)**

# (35,322)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1930

# No. 400

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MASCOT OIL COMPANY, INC., PETITIONER,

*vs.*

THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1930

[fols. a & 1]

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1930~~

No. 400

MASCOT OIL COMPANY, INC., Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MAY IT PLEASE THE COURT:

Theodore B. Benson, on behalf of Mascot Oil Company, Inc., a body corporate, prays that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above cause on June 2, 1930.

## Statement

The petitioner, a California corporation, filed its tax return for the year 1918 during the month of August 1919 and reported the tax in the amount of $58,138.49 of which $43,603.86 was paid during the year 1919, $330.22 was credited November 16, 1925, from an overassessment from 1917, leaving an unpaid balance of $14,204.41 which was abated April 28, 1926.

In December of 1919, the petitioner filed a claim in abatement in the amount of $17,492.81 and during the month of July, 1920, the Commissioner of Internal Revenue assessed a further tax in the amount of $38,030.51 of which $4,334.38 was paid in 1920, $4,829.49 was abated in 1926, leaving an unpaid balance of $28,846.64. In August, 1920, the peti-
[fol. 2] tioner filed a claim in abatement in the amount of $33,696.13. The claims in abatement in the amounts of $17,492.81 and $33,696.13 were by the Commissioner allowed for $19,053.70 and rejected for $32,135.24.

On September 18, 1925, the petitioner deposited with its bank the sum of $65,000.00 and the bank on October 10, 1925, advised the collector that the amount had been deposited and that the bank was authorized to pay "up to

this amount upon your final determination of the amount due from the Mascot Oil Company as additional tax for the years 1917 and 1918, and that said payment will be made to you upon your demand."

On the following day the petitioner and the Commissioner of Internal Revenue signed an income and profits tax waiver whereby the petitioner waived any period of limitation as to the time within which distraint or a proceeding in court might be begun for the collection of the tax as provided in Section 278(d) of the existing revenue act, the same to remain in effect to December 31, 1926.

On May 28, 1926, the collector made demand on the petitioner for $28,846.64, the unpaid balance of a tax computed by the Commissioner, which sum the petitioner paid to the collector under protest June 8, 1926. Payment was not made by the bank and the collector withdrew all claim to the deposit.

## The Statutes Involved

The statutes here involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113); Sections 607 (45 Stat. 874), 611 and 612 (45 Stat. 875) of the Revenue Act of 1928 and Section 3226 of the Revised Statutes, as amended (44 Stat. 116).

[fol. 3] Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266) as applicable here reads in part as follows:

"* * * If upon examination of a return made under * * * the Revenue Act of 1918, or * * * a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *."

Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113) as applicable here reads as follows:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the tax-payer has overpaid the tax. * * *"

Sections 607, 611 and 612 of the Revenue Act of 1928 (45 Stat. 791, 874, 875) read as follows:

"Sec. 607. Effect of Expiration of Period of Limitations Against United States.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

[fol. 4] "Sec. 612. Repeal of Section 1106(a) of 1926 Act.—Section 1106(a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1926 and not changed by the Revenue Act of 1928, (44 Stat. 116), reads as follows:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have

been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

## A.

## The Questions Presented

1. Is the right of the petitioner to recover a sum of money collected from it as a tax after the expiration of the five-year period of limitation for collection prescribed by Section 250(d) of the Revenue Act of 1921, affected by the fact that, after the statute had run, the petitioner made a deposit with its bank with instructions to pay a tax up to the amount of the deposit to the collector, which instructions were communicated to the collector but which deposit was not applied to the payment and the collector, after having collected the sum from the petitioner as a tax, withdrew all claim to the deposit?

[fol. 5] 2. Is the right of the petitioner to recover the amount of a tax, assessed prior to June 2, 1924, but collected after the expiration of the five-year period of limitation for collection prescribed by Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265) affected by the fact that, after the statute had run, the petitioner and the Commissioner of Internal Revenue signed a consent in writing and

agreed to extend the period for collection as defined in Section 278(d) of the Revenue Act of 1924 (43 Stat. 299)?

3. The meaning and construction of Section 611 of the Revenue Act of 1928 (45 Stat. 875), to determine whether the section is to be construed to apply to this case.

4. The constitutionality of Section 611, if construed to apply to this case in which the sum in question was collected as a tax after the enactment of Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113) which declares specifically that the bar of the statute of limitations against the United States (Section 250(d) of the Revenue Act of 1921) shall extinguish the liability of the taxpayer.

5. The constitutionality of Section 612 of the Revenue Act of 1928 (45 Stat. 875) which reads that Section 1106(a) of the Revenue Act of 1926 "is repealed as of February 26, 1926" and a determination of the power of a subsequent Congress to repeal Section 1106(a) of the Revenue Act of 1926 as of the date of its enactment.

## B.

## Reasons for the Allowance of the Writ

1. The court below held as a matter of law that "the liability for the tax still existed" after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921. The only interpretation that can be given [fol. 6] this statement and what the court in fact held is that a sum paid as a tax cannot be recovered because paid after expiration of the statute. This is the principle applied by that court in Toxaway Mills v. United States, 61 Ct. Cl. 363, reversed on confession of error 63 Ct. Cl. 646.

2. The decision of the court below that the petitioner is not entitled to recover because of the deposit made and of the waiver given, which were both after the expiration of the statutory period for collection, conflicts directly with the decision of the Court of Appeals of the District of Columbia in Joy Floral Company v. Commissioner, 29 F. (2d) 865, 58 App. D. C. 277.

3. The question here involved with reference to the effect of the making of the deposit and the giving of the waiver

after the expiration of the statute is similar to the questions presented to this Court in the cases of Charles H. Stange v. United States, No. 23, October Term 1930, Aiken v. Commissioner of Internal Revenue, No. 69, October Term 1930, and W. P. Brown & Sons Lumber Company v. Commissioner of Internal Revenue, No. 115, October Term 1930, in which cases this Court has granted writs of certiorari. The writ should be granted in this case for the same reasons that writs were granted in the cases mentioned.

4. There is no similarity whatever between this case and that of United States v. John Barth Company, 279 U. S. 370, and the court below clearly erred in holding that such case is controlling. The decision of the court below is in fact contrary to the decision of this Court in the John Barth Company case.

5. The holding of the court below that the petitioner cannot recover because the letter from the petitioner's bank to the collector constitutes a valid contract for the payment [fol. 7] of the amount of the tax after the expiration of the statute of limitations conflicts directly with the express provisions of Section 250(d) of the Revenue Act of 1921 which requires for the the extension of the statute of limitations the consent in writing of "both the Commissioner and the taxpayer". This holding of the court below is in direct conflict with the decision of this Court in Botany Worsted Mills v. United States, 278 U. S. 282, 49 S. Ct. 129.

6. The holding of the court below that the waiver, in which Section 278(d) of the Revenue Act of 1924 is referred to and incorporated, is to be construed to apply to this case to extend the period defined in Section 250(d) of the Revenue Act of 1921 conflicts with the decision of this Court in the case of Russell v. United States, 278 U. S. 181, 49 S. Ct. 121.

7. The court below has itself held in the case of Wyman, Partridge & Company, v. United States decided June 2, 1930, that it was beyond the power of a subsequent Congress to repeal Section 1106(a) of the Revenue Act of 1926 as of February 26, 1926, the date of its enactment. This question has also been so decided by the Circuit Court of Appeals for the Third Circuit in Heiner, Collector v. Erie Coal & Coke Company, decided July 9, 1930.

Wherefore it is respectfully submitted that this petition should be granted.

Mascot Oil Company, Inc., by Theodore B. Benson,
Theodore B. Benson, Counsel for Petitioner.

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[fols. a & 1] IN THE COURT OF CLAIMS

No. K-67

MASCOT OIL COMPANY, INC., Claimant,

v.

THE UNITED STATES OF AMERICA

I. PETITION—Filed February 27, 1929

To the Court of Claims of the United States and to the Honorable the Chief Justice and Judges thereof:

The above-named claimant by this, its petition, respectfully shows:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of California, engaged in the business of producing crude oil and having its principal office and place of business at 489 I. W. Hellman Building, Los Angeles, California.

2. The claimant has a just claim against the United States for the refund of $28,826.64, together with interest thereon, paid by it to the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, as corporation income and profits taxes for the calendar year 1918, wrongfully collected by the Commissioner of Internal Revenue of the United States.

3. The provisions of law under which such assessment and wrongful collection were made are contained in Sec-
[fol. 2] tions 230 and 301 of an Act of Congress approved February 24, 1919, entitled "An Act to Provide Revenue, and for Other Purposes," and known as the Revenue Act of 1918.

4. The provisions of law on which the claimant claims such refund are contained in Section 250(d) of an Act of Congress approved November 23 1921, entitled "An Act to Reduce and Equalize Taxation, to Provide Revenue, and for Other Purposes," and known as the Revenue Act of 1921.

5. Pursuant to the provisions of Section 3173 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided and on August 16, 1919, on official form 1120 the claimant duly made to the Commissioner of Internal Revenue its return of corporation income and profits taxes for the calendar year 1918, and reported therein as such taxes the sum of $58,138.49, which said sum was paid and discharged as follows: March 10, 1919, $17,500.00, June 14, 1919, $17,500.00, September 16, 1919 $8,603.86, Credit Claim Schedule 17342, $330.22, Abated Schedule 20299, April 28, 1926, $14,204.41.

6. Thereafter the Commissioner of Internal Revenue audited and revised the return so filed and found an additional tax in the amount of $38,030.51, which said sum was by the Commissioner of Internal Revenue assessed during the month of July, 1920, and which said sum was paid and discharged as follows: August 24, 1920, $4,334.38, Abated Schedule 20299, April 28, 1926, $4 849.29, June 8, 1926, $28,846.64, Adjustment $.20.

[fol. 3] 7. On May 28, 1926, the said Collector of Internal Revenue made demand on the claimant for the said sum of $28,846.64, which said demand was accompanied by threat of distraint and seizure and sale of property. Pursuant to such demand and on June 8, 1926, the claimant paid the said sum of $28,846.64 to the said Collector of Internal Revenue.

8. On information and belief the claimant avers that the total of all the sums so paid to the said Collector of Internal Revenue were thereafter by the said Collector turned over to and deposited in the Treasury of the United States of America as in the usual course of said Collector's official business.

9. Pursuant to the provisions of Section 3220 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided, the claimant on or about October 28, 1928, duly filed with the Commissioner of Internal Revenue, by causing the same to be de-

posited with the Collector of Internal Revenue, a claim for refund in the amount of $28,846.64.

10. The Commissioner of Internal Revenue considered the said claim for refund and rejected the same by letter dated December 14, 1928.

11. No legally valid waiver, agreement or consent extending the time for collection has at any time been entered into by the claimant and the Commissioner of Internal Revenue.

12. The said sum of $28,846.64, together with interest thereon, is wrongfully withheld from the claimant for the [fols. 4 & 5] reason that it was collected from the claimant under threat of distraint, seizure and sale of property after the expiration of the statutory period within which such collection could be legally made under the provisions of Section 250 (d) of the said Revenue Act of 1921.

13. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. The claimant is and always has been the sole and absolute owner of the claim here presented. It has not made nor attempted to make any transfer or assignment of the said claim or any part thereof or of any interest therein. The claimant is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

14. The claimant believes the facts as hereinabove stated to be true.

Wherefore the claimant prays judgment against the United States of America upon the facts and law for $28,826.64, together with interest thereon from the several dates of said payments and its reasonable costs and disbursements herein.

Mascot Oil Company, Inc., Claimant, by P. E. Spellacy. (Sgd.) Theodore B. Benson, Attorney for Claimant. (Seal.)

*Duly sworn to by P. E. Spellacy. Jurat omitted in printing.*

[fol. 6] II. General Traverse—Filed April 8, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

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III. Argument and Submission of Case

On December 5, 1929, this case was argued and submitted on merits by Mr. Theodore B. Benson, for plaintiff, and by Mr. George H. Foster, for defendant.

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[fol. 7] IV. History of Proceedings

On February 17, 1930, the court filed special findings of fact, conclusion of law and opinion by Green, J., and entered a judgment dismissing the petition.

On March 8, 1930, the plaintiff filed a motion for correction of special findings of fact.

On April 14, 1930, the court filed an order amending the special findings of fact, filed February 17, 1930.

On May 13, 1930, the plaintiff filed a motion for leave to file motion for modification of order correcting special findings of fact. Said motion was allowed by the court, May 14, 1930, and said motion for reconsideration of motion for correction of special findings of fact was filed.

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V. Order of Court—Entered May 15, 1930

Order

Now on this fifteenth day of May 1930, the motion of the plaintiff for modification of the order heretofore made for correction of the special findings of fact is submitted and sustained, and it is ordered that the findings and opinion heretofore entered in this cause be withdrawn, and the

judgment heretofore entered be set aside, new findings, opinion, and judgment to be rendered hereafter.

By the Court.

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[fol. 8] **VI. Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green, J.**—Filed June 2, 1930

Mr. Theodore B. Benson for plaintiff. Mr. George H. Foster, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant. Mr. McClure Kelley was on the brief.

This case having been heard by the Court of Claims, the court, in accordance with the stipulation of the parties filed herein, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiff is a corporation and in August, 1919, duly filed its corporation income and profits tax return for the calendar year 1918, showing a tax to be due thereon of $58,138.49, which amount was accordingly assessed, and $43,603.86 was paid during the year 1919, $330.22 thereof was credited November 16, 1925, from an overassessment for the year 1917, leaving an unpaid balance of $14,204.41, which amount was abated April 28, 1926.

2. In December, 1919, the plaintiff filed with the collector a claim in abatement for the year 1918 in the sum of $17,492.81, and during the month of July, 1920, the Commissioner of Internal Revenue assessed a further and additional tax against the plaintiff in the sum of $38,030.51, of which $4,334.38 was paid August 24, 1920, and $4,849.49 abated April 28, 1926, leaving an unpaid balance of $28,846.64.

3. In August, 1920, the plaintiff filed a claim in abatement for the sums of $8,664.29 and $33,696.13 covering the years 1917 and 1918, respectively.

4. On September 18, 1925, plaintiff deposited in escrow with the Farmers and Merchants National Bank of Los Angeles the sum of $65,000 to insure payment of the tax finally determined to be due for the years 1917 and 1918.

On October 10, 1925, the said bank addressed a letter to the Collector of Internal Revenue and stated:

"* * * please be advised that the Mascot Oil Company deposited with this bank on September 18th the sum of sixty-five thousand dollars ($65,000.00), and we are authorized by the said Mascot Oil Company to pay you up to this amount upon your final determination of the amount due from the Mascot Oil Company as additional tax for the years 1917 and 1918, and that said payment will be made to you upon your demand."

[fol. 9] 5. On the day following that on which the deposit was made in the bank, as hereinabove recited, the plaintiff and the commissioner signed an income and profits tax waiver, whereby the taxpayer waived "any period of limitation as to the time within which distraint or a proceeding in court may be begun for the collection of the tax," as provided in section 278 (d) of the existing revenue act for the years 1917 and 1918, the same to remain in effect until December 31, 1926. On March 29, 1926, the plaintiff signed and forwarded to the Commissioner of Internal Revenue a "waiver of right to file a petition with the U. S. Board of Tax Appeals * * * under section 274 (a) of the revenue act of 1926," and consented to the assessment and collection of a deficiency in tax for the year 1918 aggregating $29,177.06. A proviso was attached thereto that the waiver did not extend the statute of limitations for refund or assessment of the tax and that the waiver is not an agreement as provided under section 1106 of the revenue act of 1926.

6. The claim in abatement filed in December, 1919, in the sum of $17,492.81, and also the claim in abatement filed in August, 1920, for $33,696.13 for the year 1918, were allowed for $19,053.70 and rejected for $32,135.24.

7. On May 28, 1926, the collector made demand on the plaintiff for the sum of $28,846.64 representing unpaid balance of taxes alleged to be due for the year 1918, which the plaintiff paid under protest on June 8, 1926. Whereupon the collector withdrew all claim upon the deposit which had been made to guarantee payment for such tax.

8. On October 28, 1928, the plaintiff duly filed a claim for refund in the amount of $28,846.64, being the amount of additional taxes paid for the year 1918 as aforesaid. The ground of the claim for refund was that the taxes were collected after the expiration of the period of limitation. This claim for refund was rejected by the commissioner.

## Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

## Opinion

Green, Judge, delivered the opinion of the court:

This action is begun to recover taxes which had been paid after the period of limitations had run against their collection. Counsel for plaintiff supports its case by the same line of argument that was presented to this Court in Oak Worsted Mills v. United States, 68 C. Cls. 539, and Gotham Can Co. v. United States, 68 C. Cls. 749, in both instances adversely to the plaintiffs therein. In the Oak Worsted Mills case, supra, we held that sections 607 and 611 of the [fol. 10] act of 1928 prevented a recovery. In the Gotham Can Co. case, supra, we held that section 1106 (a) of the act of 1926 was of no benefit to the plaintiff where the taxes in question had been collected prior to the time when the revenue bill of 1926 went into effect unless it was shown that the taxes were overpaid. It was expressly stated, however, in that decision that the court did not pass on the effect of the provision in the revenue bill of 1928 which repealed section 1106 (a) of the act of 1926 as of the date of its enactment. In the case at bar, it appears that the taxes in controversy were collected after the 1926 act went into force. The decision in the Gotham Can Co. case is therefore not controlling herein because it does not determine the construction or effect of section 1106 (a) when the

taxes were collected after the period of limitations had expired and the 1926 act was in force. But we do not find it necessary to determine the question left open by the Gotham Can Co. case for the reason that the defendant sets up an entirely new and different defense from anything pleaded in the two cases cited above and insists that the facts shown in support of this defense are sufficient by themselves and alone to warrant a judgment in its favor.

This defense is that the evidence shows that the plaintiff had made a deposit in a bank as a guarantee of the payment of the taxes in controversy when finally determined. In consideration of this deposit, the bank advised the collector of internal revenue that it would pay the amount of taxes finally determined by the commissioner to be due from the plaintiff, the case was held up until determination had been made, and thereafter when such taxes were finally determined the plaintiff paid the amount thereof and obtained a release of the deposit. The defendant contends that the principles laid down in the case of United States v. John Barth Co., 279 U. S. 370 in any event prevent the plaintiff from recovering the refund in controversy. In that case the Government brought suit to enforce a bond given by the defendant and its surety for the payment of taxes, and the defense was made that payment was exacted after the collection of the tax was barred by the statute of limitations. The court said that neither the statute of limitations nor section 1106 (a) of the revenue act of 1926 applied to an action upon a bond, and the signers of the bond were not relieved from the obligation arising out of that instrument. The court further said that—

"* * * the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government."

Judgment was accordingly rendered against the taxpayer.

It is true that in the case last cited the bond was filed prior to the time when the statute of limitations expired and in the instant case the deposit was made in the bank and the guaranty given of payment after the statute had

run against the collection of the tax. We are nevertheless clear that this does not alter the situation, and that the principles announced in the John Barth Co. case, supra, determine the case at bar. In the instant case, the deposit was made and the guaranty given prior to the enactment of the 1926 act. Conceding for the purposes of the argu- [fol. 11] ment only that when the 1926 act was passed, section 1106 (a) thereof extinguished the liability for taxes collected after the statute of limitations had run and enabled a suit to be brought to recover the amount paid, it still must be said that the liability existed prior to the enactment of that act. In fact, the passage of section 1106 (a) showed that Congress recognized that the liability did exist. This, as we observed in the Gotham Can Co. case, was in pursuance of the well-known principle—so well established as to need no citation of authorities—that the statute of limitations or other bar against a remedy for the collection of a debt does not extinguish the liability therefor.

As the liability for the tax still existed at the time when the deposit was made in the bank for its payment, the contract which the bank made to pay whatever amount might finally be determined to be the tax, was made upon a valid consideration both as to the plaintiff and the bank. The bank did not, it is true, pay the tax itself as the agreement provided. The plaintiff paid the tax and thereby discharged the liability of the bank. But whether paid by plaintiff or the bank, the result was the same. The collection was not made on the ground that a tax was due, but was based on a valid contract to pay a certain amount when it was determined by the commissioner. The tax fixed the sum to be paid, but the payment and collection was by virtue of the contract and not by reason of the tax liability, and the payment therefore cannot be recovered by plaintiff. We hardly think it is necessary to cite authorities to show that the moral obligation to pay a valid debt is sufficient legal consideration for a subsequent new promise to pay if made either before or after the bar of the statute has become complete and that the new promise based upon such moral obligation is binding upon the debtor and may be shown in avoidance of the statute of limitations. But see the numerous decisions, both State and Federal, listed on this point under section 569, page 1099, of 37 Corpus Juris.

Counsel for plaintiff urge that the waiver which was executed the day following that on which the deposit was made in the bank is invalid, first, because it was executed after the statute of limitations had run, and, second, because it was so restricted by its terms as not to apply to the conditions in the case at bar. But these matters do not affect defendant's right to retain the money paid pursuant to the guaranty. While we have no necessity for considering them, it might be said that in the case of Charles H. Stange v. United States, 68 C. Cls. 395, we held that a waiver was not invalid simply for the reason that it was executed after the expiration of the period of limitations.

Without considering the other questions arising in the case, we hold that by reason of the deposit and guaranty the plaintiff is not entitled to recover herein and it is ordered that its petition be dismissed.

Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

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[fol. 12] VII. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the 2nd day of June, A. D. 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein the Court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

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[fol. 13] Clerk's certificate to foregoing transcript omitted in printing.

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Endorsed on cover: File No. 35,322. Court of Claims. Term No. 400. Mascot Oil Company, Inc., petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 27, 1930. File No. 35,322.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 27, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT, U.S.
FILED
NOV 1 1930
CHARLES ELMORE CROPLEY

Nos. 400, 412, 416, 508, 519, 529

# In the Supreme Court of the United States

OCTOBER TERM, 1930

MASCOT OIL COMPANY, INC., PETITIONER, *v.* THE UNITED STATES

ROY & TITCOMB, INC., PETITIONER, *v.* THE UNITED STATES

THE UNITED STATES, PETITIONER, *v.* WYMAN, PARTRIDGE & COMPANY

*ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS*

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER, v. ERIE COAL & COKE COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

AMERICAN GLUE COMPANY, PETITIONER, *v.* THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT*

LAURA H. JENNINGS, PETITIONER, *v.* CHARLES W. ANDERSON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**MOTION TO ADVANCE**

# In the Supreme Court of the United States

OCTOBER TERM, 1930

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No. 400

MASCOT OIL COMPANY, INC., PETITIONER, *v.* THE United States

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No. 412

ROY & TITCOMB, INC., PETITIONER, *v.* THE UNITED States

---

No. 416

THE UNITED STATES, PETITIONER, *v.* WYMAN, Partridge & Company

---

*ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS*

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No. 508

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-Third District of Pennsylvania petitioner, *v.* Erie Coal & Coke Company

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

21005—30

No. 519

AMERICAN GLUE COMPANY, PETITIONER, *v.* THE United States

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT*

No. 529

LAURA H. JENNINGS, PETITIONER, *v.* CHARLES W. Anderson

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**MOTION TO ADVANCE**

The Solicitor General moves to advance the above-entitled cases for hearing to follow immediately No. 463, *Daniel Reeves, Inc., Petitioner,* v. *Anderson.* The above-entitled cases all involve the same question as that involved in cases Nos. 36, 65, 104, 105, 323, 337, and 463, which have been assigned for hearing consecutively in that order. This question is whether Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, should be construed to deprive the taxpayers of the right which they assert that they otherwise would have had to recover taxes which had been collected after the statutory period of limitations had expired,

and, if so construed, whether this section violates the Fifth Amendment.

In addition, each of the above-entitled cases (except No. 529) presents facts which raise additional questions which are closely connected with the question stated.

The decisions in cases Nos. 36, 65, 104, 105, 323, 337, and 463 will not be conclusive of all the questions involved in any of the above-entitled cases except No. 529. All of the questions involved in all of these cases are closely related. The convenience of the Court and of the parties will be served if the above-entitled cases are heard immediately after No. 463.

In view of the nature of the questions raised in the various cases, we suggest that the above-entitled cases be assigned in the following order: No. 529, No. 519, No. 416, No. 508, No. 400, No. 412. In Nos. 416, 508, 400, and 412 the collection was made after the passage of the Revenue Act of 1926 and before the passage of the Revenue Act of 1928, and in them the taxpayers rely upon Section 1106 of the 1926 Act. This is not involved in No. 529 or No. 519.

The petitions in No. 508, *Heiner, Petitioner,* v. *Erie Coal & Coke Company;* No. 519, *American Glue Company, Petitioner,* v. *United States,* and No. 529, *Jennings, Petitioner,* v. *Anderson,* have not yet been granted, and the motion as to those cases is, of course, subject to the granting of the petitions.

All of the opposing counsel concur in this motion.
Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*

NOVEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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# Supreme Court of the United States.

OCTOBER, TERM, 1930.

## No. 400.

MASCOT OIL COMPANY, INC., PETITIONER,

*v.*

THE UNITED STATES.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

THEODORE B. BENSON,
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(35,322)

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IN THE

# Supreme Court of the United States.

OCTOBER, TERM, 1930.

## No. 400.

MASCOT OIL COMPANY, INC., PETITIONER,

*v.*

THE UNITED STATES.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

### I.

### Opinion of the Court Below.

On February 17, 1930, the court filed special findings of fact and opinion 37 F. (2d) 986, which were by order entered May 15, 1930, withdrawn and special findings of fact and opinion filed June 2, 1930, which said opinion has not as yet been officially reported but will be found printed at R. 13–16.

### II.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(a) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered June 2, 1930 (R. 16). Application for writ was presented August 27, 1930.

The suit brought in the Court of Claims is for the recovery of corporation income and profits taxes illegally collected,

jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

## III.

## The Facts.

The facts of the case are printed in the petition (R. 1-2) and to avoid repetition counsel begs leave to refer to those pages which contain the shortest and plainest statement that he has been able to make.

## IV.

## The Statutes Involved.

The statutes involved in this case are printed in the petition (R. 2-4) and to avoid repetition counsel begs leave to refer thereto.

## V.

## Specification of Errors.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the reversal of the decision of the Court of Claims are:

1. The court below erred in holding as a matter of law that "the liability for the tax still existed" after the expiration of the statutory period in which the tax legally could be collected.

2. The court below erred in holding that the petitioner is not entitled to recover a tax paid after the running of the statute of limitations against the United States, because the petitioner, after the running of the statute, made a deposit with its bank to insure payment on demand by the collector.

3. The court below erred in holding that the deposit so made was equivalent to a bond given during the statutory period and as a substitute therefor and further erred in holding

that for such reason the decision of this Court in the case of *United States* v. *John Barth Company*, 279 U. S. 370, should be followed.

4. The court below erred in not holding that the principle stated in the *John Barth Company* case, *supra*, has no application to this case because no bond was given, no new cause of action was created and suit was not on a bond but was brought under Section 3226 of the Revised Statutes.

5. The court below erred in not holding that the principle stated in the *John Barth Company* case, *supra*, has no application to this case because the deposit was made after the expiration of the statutory period for collection.

6. The court below erred in holding that the letter from the petitioner's bank to the collector is a contract and that the collection was based on a valid contract and not on the ground that a tax was due.

7. The court below erred in not holding that the deposit was made merely to insure payment on demand by the collector, which the petitioner could not refuse, and that it had no effect on the statute of limitations and did not create a new cause of action.

8. The court below erred in not holding, in accordance with its special findings of fact, that payment was not made by the bank from the deposit, nor was it made on the basis of the letter from the bank, but was made by the petitioner on demand by the collector.

9. The court below erred in not holding that a waiver of the time for collection obtained from the petitioner after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 is without consideration and is invalid and of no effect.

10. The court below erred in holding that a waiver in which Section 278(d) of the Revenue Act of 1924 is referred to and incorporated should be construed to extend the period defined in Section 250(d) of the Revenue Act of 1921.

11. The court below erred in not holding that the waiver in question by its terms refers to Section 278(d) of the Revenue Act of 1924 and has no application to this case, in which the period of limitations is that defined in Section 250(d) of the Revenue Act of 1921.

12. The court below erred in not holding that the waiver does not meet the requirements of Section 250(d) of the Revenue Act of 1921 that the Commissioner and the taxpayer consent to a later "determination, assessment, and collection of the tax."

13. The court below erred in not holding that the tax in question was illegally collected from the petitioner after the expiration of the period of limitation for collection contained in Section 250 (d) of the Revenue Act of 1921 and after the enactment of Section 1106(a) of the Revenue Act of 1926 which expressly provides that the bar of the statute of limitations against the United States shall extinguish the liability for the tax.

14. The court below erred in not holding that it was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106 (a) as of February 26, 1926, to defeat the right of the petitioner to recover the tax collected from it after the liability therefor had been extinguished.

## VI.

## The Argument.

### Summary of Argument.

*A.* The "liability for the tax" did not "still exist," after the expiration of the statutory period for collection to defeat the right of the petitioner to recover the tax paid after the statute had run.

*B.* The deposit with the bank was made after the expiration of the period within which the tax legally could be collected, but which illegal collection the petitioner could not resist. The deposit was made merely to insure the payment of the tax after the running of the statute.

*C.* The petitioner gave no bond before the expiration of the statutory period and there is no similarity between this case and that of *John Barth Company, supra.*

*D.* The letter from the bank to the collector does not constitute a waiver of the right of the petitioner to recover the amount of the tax collected from it after the expiration of the statute of limitations, because not a consent in writing of both the petitioner and the Commissioner of Internal Revenue as required by Section 250(d) of the Revenue Act of 1921.

*E.* The deposit was made and the waiver was given after the expiration of the statutory period for collection, are without consideration and are invalid and of no force and effect.

*F.* The waiver refers to and incorporates Section 278(d) of the Revenue Act of 1924 and has no relation to the period defined in Section 250(d) of the Revenue Act of 1921.

*G.* The waiver is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."

*H*. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The consent of the United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor of the exception thereto in Section 611 of the same Act.

2. Section 611 is not to be construed to apply to a case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926 and while it was in force.

3. The collection of the tax was never stayed by the claim in abatement nor otherwise.

4. The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment."

*I*. Section 611 of the Revenue Act of 1928 if construed to apply to this case, in which the tax was collected after the enactment of 1106(a) of the Revenue Act of 1926, would be unconstitutional because:

1. The power conferred on Congress by the Sixteenth Amendment is limited to the laying and collecting of taxes on incomes.

2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

*J*. It was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.

## The Argument.

A. *The "liability for the tax" did not "still exist," after the expiration of the statutory period for collection, to defeat the right of the petitioner to recover the tax paid after the statute had run.*

In its opinion and as the basis of its decision the court below stated that "the liability for the tax still existed" after the expiration of the five-year period for collection defined in Section 250(d) of the Revenue Act of 1921. It is to be carefully noted that the court held that the thing that still existed is the liability "for the tax," not the duty to pay the tax after the running of the statute with the right to recover it, but the tax liability, the right and title thereto.

What the court below actually held is that a tax paid after the bar of the statute can not be recovered from the United States. This is the same principle that the court followed in *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, in which it stated:

> "* * * The plaintiff's contention that the act furnishes a right to recover all taxes collected after the expiration of five years from the date of the taxpayer's return presents a theory that manifestly can not be sustained unless it be held that the limitation prescribed by the act of 1921 operated not alone upon the remedy but also upon the right of the Government to collect and hold additional taxes after the end of the statutory limitation, even though such additional taxes were proper liabilities of plaintiff before that time. The general rule unquestionably is that the statute of limitations operates only to bar the remedy and does not extinguish the right."

In the *Toxaway Mills* case the Court of Claims misconstrued Section 250(d) of the Revenue Act of 1921 and completely ignored Sections 3224, 3220 and 3226 of the Revised Statutes. The decision in the *Toxaway Mills* case was reversed on confession of error by the Solicitor General and should not have been followed in this case, 63 Ct. Cl. 646.

The petitioner submits that this case involves the same question as was involved in *Toxaway Mills, supra,* in which error was confessed and that the decision below conflicts with the decisions of this Court in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, 47 S. Ct. 389, and in *Graham* v. *Dupont,* 262 U. S. 234, 43 S. Ct. 567, and that the writ should be granted and the Court of Claims reversed.

B. *The deposit with the bank was made after the expiration of the period within which the tax legally could be collected, but which illegal collection the petitioner could not resist. The deposit was made merely to insure the payment of the tax after the running of the statute.*

After the statute had run against the United States it was still within the power of the collector to make the illegal collection of the amount of the tax. This the petitioner could not resist. It could not enjoin the collector, *Graham* v. *Dupont, supra,* but the petitioner could pay the tax and then recover it back, *Ellay Company* v. *Bowers,* 25 F. (2d) 637, certiorari denied 48 S. Ct. 601.

The purpose of the deposit was merely to insure payment of the amount of the tax after the statute had run. This amount the petitioner had the right to pay and recover by complying with sections 3220 and 3226 of the Revised Statutes.

The deposit of the fund with the bank with instructions to pay the collector on demand should certainly have no greater effect than actual payment. Had the tax been actually paid the petitioner could recover under the decision in the *Ellay Company* case, *supra.*

C. *The petitioner gave no bond before the expiration of the statutory period and there is no similarity between this case and that of John Barth Company, supra.*

The petitioner submits that there is no similarity between this case and that of the *United States* v. *John Barth Company,*

279 U. S. 370, 49 S. Ct. 366, which the court below referred to and followed.

The *John Barth Company* case was a suit on a bond provided for by section 234(a) paragraph 14(a) of the Revenue Act of 1918 (40 Stat. 1079), which bond this Court held created a cause of action separate and distinct from an action to collect taxes. In the present case the suit is not on a bond nor is it based on the fact that the deposit was made. The Court's attention is called to the further fact that the collection of the tax was not made from the deposit but from the petitioner in the same manner as a tax is ordinarily collected, the collector having elected to proceed against the petitioner and to ignore the deposit and the bank with which made.

In the *John Barth Company* case, the bond was given before the expiration of the statutory period and as a substitute therefor. In the course of the opinion, Chief Justice Taft referred to the fact that "the bond was given well within the five years after the return" and stated, "The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had." In the present case the deposit was made well after the expiration of the five years and question here involved is altogether different from that under consideration in the *John Barth Company* case.

The question here involved is one of importance for the reason that the practice of making a deposit to insure the collection of the tax has been resorted to in numerous instances and this Court should pass on the validity and effect of a deposit as a substitute for a bond. The Commissioner of Internal Revenue has treated the question here involved as one of importance and has published the decision of the court below in full in the Internal Revenue Bulletin, Volume IX-28-4692, and the General Counsel, of the Bureau of Internal Revenue, has made reference to it in G. C. M. 8193, published in the Internal Revenue Bulletin, IX-28-4691.

D. *The letter from the bank to the collector does not constitute a waiver of the right of the petitioner to recover the amount of the tax collected from it after the expiration of the statute of limitations, because not a consent in writing of both the petitioner and the Commissioner of Internal Revenue as required by Section 250(d) of the Revenue Act of 1921.*

The holding of the court below that "the collection was not made on the ground that the tax was due, but was based on a valid contract to pay a certain amount" is erroneous both in law and fact. It is in direct conflict with the provisions of Section 250(d) of the Revenue Act of 1921 which require the consent in writing of both the Commissioner and the taxpayer. The decision is erroneous in fact because it conflicts with the special finding that collection was made, not from the bank and on the basis of the letter, but from the petitioner as a tax.

E. *The deposit was made and the waiver was given after the expiration of the statutory period for collection, are without consideration and are invalid and of no force and effect.*

The question here involved is similar to that presented to this Court in *Charles H. Stange* v. *United States*, No. 23, October Term, 1930, *Aiken* v. *Commissioner of Internal Revenue*, No. 69, October Term 1930, and *W. P. Brown & Sons Lumber Company* v. *Commissioner of Internal Revenue*, No. 115, October Term, 1930, and the petitioner submits that the writ should be granted in this case for the same reason that writs were granted in the cases mentioned. The principle involved is the same, the effect of the running of the statute against the United States. In the *John Barth Company* case, *supra*, this Court did not pass on the effect of a bond, a deposit or a waiver given after the running of the statute. That the question is an open one is evidenced by the granting of the writs in *Stange* and other cases mentioned.

F. *The waiver refers to and incorporates Section 278(d) of the Revenue Act of 1924 and has no relation to the period defined in Section 250(d) of the Revenue Act of 1921.*

The waiver is of the period of limitation for the beginning of distraint or a proceeding in court for the collection of the tax as provided in Section 278 (d) of the existing revenue act, meaning of necessity the Revenue Act of 1924.

Section 278 (d) of the Revenue Act of 1924 is referred to and incorporated in the waiver and the waiver can not be construed to mean that the petitioner referred to or intended to extend any other limitation period. The waiver does not refer to and is not an extension of the period for collection as defined in Section 250 of the Revenue Act of 1921, which under the decision of this Court in *Benjamin Russell et al.* v. *United States*, 278 U. S. 181, 49 S. Ct. 121, is the limitation period applicable to this case.

All that the petitioner and the Commissioner of Internal Revenue have done is to agree to extend a period of limitation which has no application to this case. The waiver is of no effect and the court below erred in failing to so hold.

While consideration of the question here involved may, due to other issues, not be necessary to the decision of this case, the question is of importance for the reason that the form of waiver here under consideration was entered into in numerous other cases and was in common use prior to the decision of the *Russell* case.

G. *The waiver is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."*

The waiver is of the time for beginning distraint or suit "for the collection of the tax." Section 250(d) of the Revenue Act of 1921 provides that no suit or proceeding shall be begun after five years from the filing of the return, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The waiver in question is merely of the collection. It is not of the

"determination, assessment, and collection" required by the statute.

H. *The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case.*

The decision of the court below with reference to the provisions of Section 611 of the Revenue Act of 1928 conflicts directly with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *Burden, Smith & Company*, 33 F. (2d) 229.

This Court has granted writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Graham & Foster, Co-partners, etc.* v. *Goodcell, Collector*, No. 36, October Term, 1930, and to the Court of Claims in *Percival E. Magee* v. *United States*, No. 65, October Term, 1930, *Oak Worsted Mills* v. *United States*, No. 104, October Term, 1930, and *Taft Woolen Company* v. *United States*, No. 105, October Term, 1930, to review the decisions by those courts with reference to the application of Section 611.

Applications for writs in the cases above mentioned were not opposed by the Solicitor General and counsel therefore submits that the writ should be granted in this case.

I. *Section 611 if construed to apply would be unconstitutional.*

AND

J. *It was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.*

The questions relating to the constitutionality of Section 611 of the Revenue Act of 1928 if construed to apply to this case in which the tax was collected while Section 1106(a) of the Revenue Act of 1926 was in force and the questions relating

to the power of a subsequent Congress to repeal 1106(a) as of February 26, 1926, are the same as those involved in the cases of *Wyman, Partridge & Company* v. *United States,* decided by the Court of Claims June 2, 1930, and *Heiner, Collector,* v. *Erie Coal and Coke Company,* decided by the United States Circuit Court of Appeals for the Third Circuit on July 9, 1930, in each of which cases the Solicitor General has applied for a writ of certiorari.

**Conclusion.**

It is, therefore, respectfully submitted that the questions involved in this case with reference to the deposit and to the waiver are substantially the same as those involved in the *Stange* and related cases heretofore mentioned in which writs of certiorari have been granted and that the questions relating to Sections 607 and 611 of the Revenue Act of 1928 and to Section 1106(a) of the Revenue Act of 1926 are the same as those involved in the *Wyman, Partridge & Company* case in which the Solicitor General has applied for a writ. The writ should therefore be granted in this case.

THEODORE B. BENSON,
*Counsel for Petitioner.*

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# Supreme Court of the United States.

OCTOBER TERM, 1930.

## No. 400

MASCOT OIL COMPANY, INC., PETITIONER,

*v.*

THE UNITED STATES, RESPONDENT.

## Brief for Petitioner.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1930.

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**No. 400.**

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MASCOT OIL COMPANY, INC., PETITIONER,

*v.*

THE UNITED STATES.

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## BRIEF FOR PETITIONER.

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### STATEMENT OF THE CASE.

This is a suit brought by the petitioner in the Court of Claims to recover $28,846.64, additional income and profits taxes for the calendar year 1918, collected after the expiration of the five-year period for collection prescribed by Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265. To the petitioner's cause of action the respondent relied on the fact that after the expiration of the five-year period the petitioner made a deposit with its bank to insure the payment of the tax and on the fact that after the expiration of the five-year period prescribed in Section 250(d) of the Revenue Act of 1921 the petitioner and the Commis-

sioner of Internal Revenue entered into a consent in writing as provided in Section 278(d) of the Revenue Act of 1924, c. 234, 43 Stat. 299. The respondent also relied on Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, and the Court of Claims held (Rec. 11 et seq.) that the petitioner is not entitled to recover because the deposit was made and the waiver was given, 42 F. (2d) 309.

This Court granted a writ of certiorari October 27, 1930, to review the decision of the court below.

Unless otherwise indicated the italics of this brief are those of the petitioner.

## I.

## Opinion of the Court Below.

The opinion of the court below was rendered by the Court of Claims on June 2, 1930. The opinion has been reported in 42 F. (2d) 309 and is a part of the record on this appeal (R. 13-16).

## II.

## Jurisdiction.

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(b) of the Act of February 13, 1925 (45 Stat. 936).

The date of the judgment of the Court of Claims sought to be reversed is June 2, 1930 (R. 16). The petition applying for the writ of certiorari was filed August 27, 1930, and was granted October 27, 1930.

## III.

## Statement of the Facts.

The petitioner filed its return for the calendar year 1918 during the month of August, 1919, and filed a claim in abate-

ment during the month of December, 1919. During the month of July, 1920, the Commissioner of Internal Revenue assessed an additional tax and in August, 1920, the petitioner filed a second claim in abatement (R. 11).

On September 19, 1925, the petitioner deposited with its bank $65,000.00 and the bank on October 10, 1925, advised the collector that the amount had been deposited and that the bank was authorized to pay the collector up to this amount.

On the following day the petitioner and the Commissioner signed an income and profits tax waiver whereby the petitioner waived the time within which distraint or a proceeding in court might be begun for the collection of the tax, as provided in Section 278(d) of the existing Revenue Act.

On May 28, 1926, the collector made demand on petitioner for the sum of $28,846.64, representing the unpaid balance of the said assessment of additional tax, which the petitioner paid to the collector under protest June 8, 1926. Payment was not made by the bank from the deposit. On receipt of payment from the petitioner the collector withdrew all claim to the deposit.

## IV.

### Statutes Involved.

The statutes here involved are Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266); Section 1106(a) of the Revenue Act of 1926 (44 Stat. 113); Sections 607 (45 Stat. 874), 611 and 612 (45 Stat. 875) of the Revenue Act of 1928 and Sections 3220 (c. 901, 45 Stat. 996) and 3226 (44 Stat. 116) of the Revised Statutes, as amended.

Section 250(d) of the Revenue Act of 1921 (42 Stat. 227, 265, 266) as applicable here reads in part as follows:

> "The amount of income, excess-profits, or war-profits taxes due under any return * * * shall be

> determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed. * * *"

Sections 1106(a) of the Revenue Act of 1926, and Sections 607, 611 and 612 of the Revenue Act of 1928, are printed in the petition (R. 3).

Section 3220 of the Revised Statutes, as amended and reenacted by the Act of May 29, 1928, Sec. 3, c. 901, 45 Stat. 996, reads as follows:

> "Sec. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:
>
> 'REFUNDMENTS: TAXES AND PENALTIES—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, agent or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in ercess of $500, at the beginning of each regular session of Congress of all transactions under this section.' Approved, May 29, 1928."

Section 3226 of the Revised Statutes as amended, is printed in the petition (R. 3-4).

## V.

### Specification of Errors.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the reversal of the decision of the Court of Claims are:

1. The court below erred in holding as a matter of law that "the liability for the tax still existed" after the expiration of the statutory period in which the tax legally could be collected.

2. The court below erred in holding that the petitioner is not entitled to recover a tax paid after the running of the statute of limitations against the United States, because the petitioner, after the running of the statute, made a deposit with its bank to insure payment on demand by the collector.

3. The court below erred in holding that the deposit so made was equivalent to a bond given during the statutory period and as a substitute for the liability for the tax and further erred in holding that for such reason the decision of this Court in the case of *United States* v. *John Barth Company*, 279 U. S. 370, 49 S. Ct. 366, should be followed.

4. The court below erred in holding that the letter from the petitioner's bank to the collector is a contract and that the collection was based on a valid contract and not on the ground that a tax was due.

5. The court below erred in not holding that the deposit was made merely to insure payment on demand by the collector, which the petitioner could not refuse, and that it had no effect on the statute of limitations and did not create a new cause of action.

6. The court below erred in not holding, in accordance with its special findings of fact, that payment was not made by the bank from the deposit, nor was it made on the basis of the letter from the bank, but was made by the petitioner on demand by the collector.

7. The court below erred in not holding that a waiver of

the time for collection obtained from the petitioner after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 is invalid and of no effect.

8. The court below erred in holding that a waiver in which Section 278(d) of the Revenue Act of 1924 is referred to and is incorporated should be construed to extend the period defined in Section 250(d) of the Revenue Act of 1921.

9. The court below erred in not holding that the waiver does not meet the requirements of Section 250(d) of the Revenue Act of 1921 that the Commissioner and the taxpayer consent to a later "determination, assessment, and collection of the tax."

10. The court below erred in not holding that the provisions of Section 611 of the Revenue Act of 1928 do not apply to this case.

11. The court below erred in not holding that to the extent that Section 611 may be construed to limit the authority of the Commissioner of Internal Revenue to refund the tax illegally collected or the right of the petitioner to recover it, the section has been repealed and superseded by the later act of Congress, Section 3220 of the Revised Statutes, as amended.

12. The court below erred in not holding that, if construed to apply to this case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926, Section 611 of the Revenue Act of 1928 would be unconstitutional because in violation of the Fifth Amendment.

13. The court below erred in not holding that it was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to defeat the right of the petitioner to recover the tax collected from it after the liability therefor had been extinguished.

## VI.

### Questions Presented.

1. Is the petitioner deprived of the right it would otherwise have to recover the amount illegally collected from it as a tax after the expiration of the statutory period for collection, because, after the expiration of the statutory period, it deposited with its bank $65,000.00 and the bank advised the collector that the amount had been deposited and that the bank was authorized to pay up to the amount "upon your final determination * * * and that said payment will be made to you upon your demand"?

2. The validity and effect of a waiver of the time for the collection of a tax given after the expiration of the statutory period for collection.

3. The validity and effect of a waiver of a statutory period for collection of a tax which has no application to the case.

4. The validity and effect of a waiver of "collection of the tax" which does not also provide for a "later determination, assessment, and collection of the tax" as required by Section 250(d) of the Revenue Act of 1921.

5. Are the provisions of Sections 607, 611 and 612 of the Revenue Act of 1928 to be construed to apply to deprive the petitioner of its right to recover the amount illegally collected from it as a tax after the enactment of Section 1106(a) of the Revenue Act of 1926?

6. If Section 611 otherwise can be construed to apply has it to that extent been repealed and superseded by the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, a later act?

7. If Sections 611 and 612 are to be construed to apply would the petitioner be deprived of its property or would its property be taken in violation of the Fifth Amendment to the Constitution?

## VII.

## The Argument.

### Summary of Argument.

A. The "liability for the tax" did not "still" exist, after the expiration of the statutory period for collection to defeat the right of the petitioner to recover the tax paid after the statute had run.

B. The deposit with the bank was made merely to insure the collection of the amount of the tax after the expiration of the period within which the collection legally could have been made, but which later collection the petitioner could not have resisted.

C. The petitioner gave no bond before the expiration of the statutory period for collection and there is no similarity between this case and that of *United States* v. *John Barth Company, supra.*

D. The letter from the bank to the collector does not constitute a waiver of the right of the petitioner to recover the amount of the tax collected from it after the expiration of the statute of limitations, because not a consent in writing of both the petitioner and the Commissioner of Internal Revenue as required by Section 250(d) of the Revenue Act of 1921.

E. The waiver was given after the expiration of the statutory period for collection and is therefore of no force and effect.

F. The waiver is of the limitation period defined in Section 278(d) of the Revenue Act of 1924 and has no application to the collection of the tax assessed in July, 1920.

G. The waiver is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."

H. The provisions of Section 611 of the Revenue Act of 1928 do not apply:

1. The consent of the United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor of the exception thereto in Section 611 of the same Act.

2. Section 611 is an administrative provision and is not to be construed to be retroactive.

3. Section 611 is not to be construed to apply to a case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926 and while the section was in force.

4. The collection of the tax was never stayed by the claim in abatement nor otherwise.

5. The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment."

I. To the extent that it might otherwise be construed to apply Section 611 has been repealed by Section 3220 of the Revised Statutes, a later act.

J. Section 611 of the Revenue Act of 1928 if construed to apply to this case, in which the tax was collected after the enactment of 1106(a) of the Revenue Act of 1926, would deprive the petitioner of its property without due process of law in violation of the Fifth Amendment.

K. It was beyond the power of a subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.

## POINT A.

## THE "LIABILITY FOR THE TAX" DID NOT "STILL" EXIST, AFTER THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION, TO DEFEAT THE RIGHT OF THE PETITIONER TO RECOVER THE TAX PAID AFTER THE STATUTE HAD RUN.

In its opinion and as the basis of its decision the court below stated that "the liability for the tax still existed" after the expiration of the five-year period for collection defined in Section 250(d) of the Revenue Act of 1921. It is to be carefully noted that the court held that the thing that still existed is the liability "for the tax," not the duty to pay the tax after the running of the statute with the right to recover it, but the tax liability, the right and title thereto.

What the court below actually held is that a tax paid after the bar of the statute can not be recovered from the United States. The reasoning of the court is that the statute operates only to bar the remedy and does not extinguish the liability. This is the same principle that the court followed in *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, in which it misconstrued Section 250(d) of the Revenue Act of 1921 and completely ignored Sections 3224 and 3220 and 3226 of the Revised Statutes. The decision of the court below in the *Toxaway Mills* case was reversed on confession of error by the Solicitor General, 273 U. S. 781, 47 S. Ct. 471, and should not have been followed in this case.

The petitioner submits that on the expiration of the five-year period provided in Section 250(d) of the Revenue Act of 1921 the liability was extinguished. See Petitioner's Brief in *Percival E. Magee* v. *United States*, No. 65, October Term, 1930, pages 24 to 30. The tax was collected on June 8, 1926, and the attention of the court is called to Section 1106(a) of the Revenue Act of 1926, in which Congress provided that the bar of the statute of limitations shall extin-

guish the liability. This case involves a similar question to that involved in *Toxaway Mills* v. *United States, supra,* in which error was confessed. The decision below conflicts with the decisions of this Court in *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346, 47 S. Ct. 389; *Graham* v. *Dupont,* 262 U. S. 234, 43 S. Ct. 567, and *Russell* v. *United States,* 278 U. S. 181, 49 S. Ct. 121.

## POINT B.

## THE DEPOSIT WITH THE BANK WAS MADE MERELY TO INSURE THE COLLECTION OF THE AMOUNT OF THE TAX AFTER THE EXPIRATION OF THE PERIOD WITHIN WHICH THE COLLECTION LEGALLY COULD HAVE BEEN MADE, BUT WHICH LATER COLLECTION THE PETITIONER COULD NOT HAVE RESISTED.

The deposit was made merely to insure the collection of the tax after the running of the statute, which collection, however illegal, the petitioner could not have resisted.

The court below found that on September 18, 1925, the petitioner deposited with its bank the sum of $65,000.00, to insure payment of the amount of the tax assessed in July, 1920. In its findings the court referred to the deposit as one in escrow and further referred to the final determination of the tax. These findings are to some extent at least conclusions of law. The finding of fact that this Court should consider is that on October 10, 1925, the bank addressed a letter to the collector of internal revenue and stated that the deposit had been made and that the bank had been authorized by the petitioner to pay the collector up to the amount of $65,000.00, "upon your final determination of the amount due * * * and that said payment will be made to you upon your demand." This was communicated to the collector.

All that the petitioner intended to accomplish by the

deposit and all that the collector desired was simply to insure that collection of the amount of the tax might be made, which collection was at the time barred by the statute of limitations. Despite the running of the statute of limitations it was still within the power of the collector to proceed to make an illegal collection of the amount of the tax and all that the deposit was intended to accomplish was to satisfy the collector that he could actually obtain the amount at a later day. The petitioner was helpless to resist the illegal collection and the mere fact that it sought to defer the day of payment should not be held to prejudice it in asserting its right to the amount illegally collected. The purpose of the deposit was merely to insure the payment of the amount of the tax after the statute had run.

The deposit of the fund with the bank with instructions to pay the collector on demand should certainly have no greater effect than actual payment would have had. Had the tax been actually paid the petitioner could recover under the decisions of this Court in *Graham* v. *Dupont*, *supra*, and *Bowers* v. *New York & Albany Lighterage Company*, *supra*, if the provisions of Section 611 of the Revenue Act of 1928 are not to be construed to defeat such recovery.

That the petitioner and the collector of internal revenue did not intend the deposit to have any such effect as was given it by the court below clearly appears from the facts that on the following day the petitioner signed the consent in writing hereinafter referred to and that the collector never availed himself of the right to demand payment from the deposit but on the contrary elected to proceed against the petitioner and to collect the amount in controversy from the petitioner as a tax. The petitioner therefore submits that this Court should entirely disregard the fact that a deposit was made and should consider this case in the same light as *United States* v. *Wyman, Partridge & Company*, No. 416, October Term, 1930, and other cases in which the illegal collection of the amount of the tax was made after the enactment of Section 1106(a) of the Revenue Act of

1926. The collection was actually made from the petitioner as a tax and the only question that the case presents is the right of the petitioner to recover the amount of a tax collected from it after the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 and after the enactment of Section 1106(a) of the Revenue Act of 1926, and prior to the enactment of Sections 611 and 612 of the Revenue Act of 1928.

The collector never so much as recognized the deposit by acknowledgment or otherwise and the fact that he ignored it in making the collection is positive proof that he gave no consideration to it.

## POINT C.

## THE PETITIONER GAVE NO BOND BEFORE THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION AND THERE IS NO SIMILARITY BETWEEN THIS CASE AND THAT OF UNITED STATES V. JOHN BARTH COMPANY, SUPRA, FOLLOWED BY THE COURT BELOW.

The court below took the position that the decision of this Court in the case of *United States* v. *John Barth Company, supra,* is controlling here. The petitioner submits that there is no similarity between the two cases. This case is to be distinguished from the John Barth Company case for a number of reasons.

The first distinction between the two cases is that in the John Barth Company case the suit was brought by the United States against the John Barth Company and its bondsman for the enforcement of the conditions of the bond. This Court was there concerned merely with the force and effect of the provisions of the bond and the case was decided accordingly. In the present case no bond was ever given and the suit is not by the United States for the enforcement of a bond or for the enforcement of any agreement or con-

tract, but the suit is one brought by the petitioner to recover the amount of the tax illegally collected from it after the expiration of the limitation period for collection. The action in the John Barth Company case as clearly pointed out by Chief Justice Taft was based on and arose from the provisions and conditions of the bond. During the course of his opinion the Chief Justice stated:

> "* * * The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. * * *"

In the present case there is no new cause of action separate and distinct from the right of the collector to collect a tax after the expiration of the statute of limitations. This case unlike the John Barth Company case involves merely the question of the effect of the statute of limitations and the cause of action is the right of the petitioner to recover a tax illegally collected. The action is based on Sections 3220 and 3226 of the Revised Statutes and not on a bond or a contract.

In the John Barth Company case the consideration for the giving of the bond was the postponement of the collection of the tax reported in the return. The bond was given in that case prior to the expiration of the statutory period for collection and "in consideration of the United States refraining from and suspending the collection of taxes thus outstanding against the Barth Company for the year 1918, pending consideration and adjudication of the foregoing claims for abatement, * * *." In the John Barth Company case the consideration clearly appears. In the present case the statute of limitations had run and the petitioner obtained no benefit from the mere postponement or delay of the illegal collection. The terms and conditions of the bond in that case were to pay any part of the tax found to be due on the subsequent determination of the Commissioner of Internal Revenue. In the present case there was

no contract or agreement whatever between the petitioner and the Commissioner of Internal Revenue nor between it and the collector of internal revenue. It is true that the letter from the petitioner's bank to the collector advised that the amount of the tax would be paid on demand but the petitioner is not privy thereto. There is in the letter no provision for consideration of the abatement claim by the Commissioner of Internal Revenue. The reference is merely to the collector and his determination and demand. There are in fact in the letter no provisions for delay, but a mere statement that payment would be made on demand. The letter was written solely to protect and for the benefit of the collector.

The most important distinction between the *John Barth Company* case and this case is that in that case "the bond was given well within the five years after the return" and, as the late Chief Justice pointed out, was a substitution for the obligation arising under the return to pay the tax. During the course of the opinion it is further stated:

> "In this case there was a return and there was an assessment, but *the bond was given well within the five years after the return*, and when the bond was given it required the obligees, if the abatement was not allowed, to pay interest from the time such tax would have been due, had no such claim been filed. In other words, *the limitation of Section 250(d) has no application to a situation following a claim of abatement and the giving of bond.*
>
> The plain *purpose of paragraph 14(a) was to effect a substitution for the obligation arising under the return* and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, * * * To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. *The object of the bond was not only to prevent the immediate collection of the*

*tax but also to prevent the running of time against the Government.* The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought."

There is a further distinction between the two cases. In the John Barth Company case the bond was expressly authorized by Paragraph 14(a), Section 234(a) of the Revenue Act of 1918 (40 Stat. 1057). In the present case the deposit of the money with the bank was an act not authorized by statute and was in fact in violation of the provisions of the revenue acts that the collector should proceed to collect the amount of the tax without delay.

The petitioner submits that there is no similarity whatever between this case and that of *United States* v. *John Barth Company* and that the court below clearly erred in applying and following the decision of this Court in that case. The question here presented is the right of the petitioner to recover a tax collected from it after the expiration of the statute of limitations, and not the right of the United States to recover on a bond given as a substitute for the liability for the payment of the tax and as to which bond the limitation period for the collection of the tax has no application.

The John Barth Company case holds that the statute of limitations in Section 250(d) of the Revenue Act of 1921 has no application to "a situation following a claim of abatement and the giving of bond" to prevent the running of the statute of limitations. The same reasoning leads to the conclusion that where no bond was given or deposit made "to prevent the running of time against the Government" that the statute of limitations does apply. The petitioner submits therefore that the decision of this Court in the John Barth Company case supports its position rather than that taken by Judge Green in the court below.

The bond in the *John Barth Company* case was given by the taxpayer to obtain the benefit of the provision of Sec-

tion 234(a), 14(a) by way of reducing income and preventing the immediate collection of the tax. The consideration for the bond was the benefit to the taxpayer. In that case this Court held the taxpayer liable on the bond and according to its terms. The same rule should not apply where a bond is given or a deposit is made solely for the benefit of the United States or of the collector. In such cases the rule should be that the bond or deposit does not create a new liability but simply insures payment of the tax liability and that a suit by the taxpayer after payment of the tax should be looked on just as any other suit for the recovery of a tax illegally collected and no importance should be attached to the bond or the deposit. In this case the collector was concerned merely in getting the amount of the tax, legally or illegally. His concern was merely to obtain credit on his books to be applied against the assessment with which he was charged. The money was placed in the bank merely as collateral to insure payment. The deposit created no primary liability. The liability for the tax was still the liability imposed by the taxing statutes.

If this Court should hold that the rule announced in the *John Barth Company* case, an action to enforce a bond, should apply in all cases in which bonds were given to the United States or to the collectors or in which deposits were made, the result would be that those ameliatory provisions of the several revenue acts for the giving of a bond to insure payment would become dead letters. To avoid such result this Court should hold that the decision in the John Barth Company case is to be limited to a suit by the United States on a bond made to it by a taxpayer to obtain some benefit under the taxing statutes and as a substitute for his liability under those statutes.

The purpose that Congress intended to accomplish by providing for a bond to insure payment was merely to protect the United States by enabling it to obtain the amount demanded as a tax whether or not due. If the decision in the *John Barth Company* case is to be extended to apply to

this case the effect would be to interrupt the practice now in force of furnishing security for the payment of tax, whether or not due, with the right to later contest the correctness of the assessment or collection. There is no statement in the opinion of the late Chief Justice which can be construed to mean that he intended the decision to apply to any case except an action by the United States on a bond given "to prevent the immediate collection of the tax but also to prevent the running of time against the Government." The petitioner submits that the court below has erroneously interpreted the opinion in that case and the error should be corrected in order that the taxing statutes may be administered as clearly intended by Congress and in accordance with the interpretation uniformly given them by the Treasury Department, that the mere furnishing of collateral to insure payment should not defeat the right of the taxpayer to contest the legality of the collection of the tax.

## POINT D.

## THE LETTER FROM THE BANK TO THE COLLECTOR DOES NOT CONSTITUTE A WAIVER OF THE RIGHT OF THE PETITIONER TO RECOVER THE AMOUNT OF THE TAX COLLECTED FROM IT AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS. BECAUSE NOT A CONSENT IN WRITING OF BOTH THE PETITIONER AND THE COMMISSIONER OF INTERNAL REVENUE AS REQUIRED BY SECTION 250(d) OF THE REVENUE ACT OF 1921.

The holding of the court below that "the collection was not made on the ground that the tax was due, but was based on a valid contract to pay a certain amount" is erroneous both in law and fact. It is in direct conflict with the provisions of Section 250(d) of the Revenue Act of 1921 which require the consent in writing of both petitioner and the

Commissioner of Internal Revenue to a later determination, assessment and collection of the tax. The decision is erroneous in fact because it conflicts with the special finding that collection was made, not from the bank and on the basis of the letter, but from the petitioner as a tax. The collector ignored the letter and elected to make the collection from the petitioner.

## POINT E.

## THE WAIVER WAS GIVEN AFTER THE EXPIRATION OF THE STATUTORY PERIOD FOR COLLECTION AND IS THEREFORE OF NO FORCE AND EFFECT.

On the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 and at the time the waiver here under consideration was given on September 19, 1925, the liability for the tax had been extinguished by the expiration of the five-year period defined Section 250(d) of the Revenue Act of 1921, and as stated by this Court in *Russell* v. *United States, supra*, the petitioner was free from liability. The tax having been extinguished and the petitioner being free from liability, to give force and effect to the waiver would be to hold that by their consent the petitioner and the Commissioner of Internal Revenue could impose a tax for the first time or could recreate a liability for a tax after it had been extinguished.

This question is before this Court in *Stange* v. *United States*, S. Ct. No. 23, October Term, 1930, and other related cases, which are to be heard with it and counsel asks leave to refer to briefs filed on behalf of petitioners therein.

A question similar to the one here under consideration came before the Court of Appeals of the District of Columbia in *Joy Floral Company* v. *Commissioner of Internal Revenue*, 29 F. (2d) 865, in which the court held that the bar of the statute of limitations could not be effectively waived by a consent filed after a lapse of the five-year period. In the course of its opinion the court stated:

> "It is unreasonable to believe that Congress felt it necessary to provide a remedy whereby taxpayers may restore to the Commissioner the right to assess income taxes upon their returns after the statute of limitations has deprived the Commissioner of authority to make any assessment thereon. * * *"

In *Pictorial Printing Company* v. *Commissioner*, 38 F. (2d) 563, the Circuit Court of Appeals for the Seventh Circuit stated:

> "Concededly, the right to take proceedings for the determination, assessment, and collection of appellant's 1916 tax terminated February 28, 1922, and when, a year and a half thereafter, the revenue officers appeared at appellant's place of business to investigate that return, *there was no longer any right to institute any proceedings looking to the determination, levy, or collection of any further tax for that year.*"
>
> "When the revenue officer then presented the waiver or consent for signature, *the taxpayer had no liability on account of the tax for 1916,* * * *."

The petitioner submits that on the expiration of the five-year period defined in Section 250(d) of the Revenue Act of 1921 the liability for the tax was extinguished and the waiver obtained from the petitioner after the extinguishment of such liability is of no force and effect because it is beyond the power of the petitioner and the Commissioner of Internal Revenue to either create or recreate a liability for a tax. The liability for a tax can be created only by an act of Congress and the voluntary act of the parties is without force and effect.

In the case of *Percival E. Magee* v. *United States, supra,* beginning at page 24 of the brief counsel for petitioner has endeavored to set forth reasons which disclose that on the expiration of the five-year period defined in Section 250(d) the liability for the tax was extinguished. Counsel there pointed out that the provisions of Section 250(d) do not provide an ordinary statute of limitations affecting the rem-

edy of the collector, for the collector can still proceed to collect and distrain if necessary. The collector's remedy is full and complete and unaffected by the running of the statute because Section 3224 of the Revised Statutes prohibits injunction of collection. If the provisions of Section 250(d) do not affect the remedy they must affect the right.

## POINT F.

## THE WAIVER IS OF THE LIMITATION PERIOD DEFINED IN SECTION 278(d) OF THE REVENUE ACT OF 1924 AND HAS NO APPLICATION TO THE COLLECTION OF THE TAX ASSESSED IN JULY, 1920.

The consent in writing that was signed by the petitioner and the Commissioner of Internal Revenue refers to and incorporates Section 278(d) of the Revenue Act of 1924 which reads in part:

> "Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax."

This Court held in the case of *Russell* v. *United States*, *supra*, that the applicable period of limitation for the collection of a tax assessed prior to June 2, 1924, is that defined in Section 250(d) of the Revenue Act of 1921 and not the limitation period defined in Section 278(d) of the Revenue Act of 1924. What has occurred in this case is, therefore, that the parties have consented in writing to extend the time defined in a statute of limitations which has no application to the collection of the additional tax assessed during the month of July, 1920. The reason the consent was written to refer to the Revenue Act of 1924 is best explained by calling attention to the fact that prior to the decision of this Court in the case of *Russell* v. *United States*,

*supra*, the Commissioner of Internal Revenue believed that the provisions of Section 278(d) of the Revenue Act of 1924 applied to all assessments regardless of the time made. In this connection attention is called to Article 1272 of Regulations 65, promulgated for the enforcement of the Revenue Act of 1924 and in which reference is made to the tax imposed by the Revenue Act of 1921 and prior revenue acts, and in which reference is also made to the period for collection defined in Section 250(d) of the Revenue Act of 1921. The regulations read in part:

> "Period of limitation upon collection of tax.—In the case of the tax imposed by * * * the Revenue Act of 1918, or by any such Act as amended, a proceeding in court for the collection thereof must be begun within five years after the return was filed. The tax imposed by the Acts enumerated may be collected by a proceeding in court within the period prescribed whether it has or has not been assessed.
>
> Exceptions to the periods of limitations outlined in the preceding paragraph are prescribed in the following cases:
>
> (1) If the tax imposed by the Acts enumerated above has been assessed within the four-year period or the five-year period as required by section 277(a) of the statute a proceeding in court or distraint for the collection of such tax may be begun within six years after the assessment thereof."

At the time the petitioner and the Commissioner of Internal Revenue signed the consent in writing the Commissioner believed that the period of limitation defined in Section 278(d) of the Revenue Act of 1924 was the applicable limitation period and laboring under this belief he drafted and caused to be printed the document which was signed by the petitioner.

After the expiration of the applicable five-year period defined in Section 250(d) of the Revenue Act of 1921 the Commissioner of Internal Revenue believed that he had the

full period of six years from the assessment of the tax, July, 1920, within which to make collection.

What has occurred is that the Commissioner of Internal Revenue laboring under a mistake of law requested and obtained from the petitioner a consent to the extension of a limitation period which has no application to the case. The question presented is the effect of a mistake of law. A mistake of law is one that can not be corrected. In *Utermehle* v. *Norment*, 197 U. S. 40, 56, 25 S. St. 291, the Court stated:

> "* * * We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of facts relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse. * * * Allen v. Galloway, 30 Fed. 466, where Hammond, J., in reviewing the decisions of this court, says: 'Whatever rule may prevail elsewhere, there can be in the equity courts of the United States no relief from a mistake of law.' "

The petitioner submits that the consent in writing for the extension of the limitation period which has no application is of no force and effect and that the consent can not be reformed to correct a mistake of law and by making it read to refer to Section 250(d) of the Revenue Act of 1921.

## POINT G.

## THE WAIVER IS NOT SUFFICIENT TO MEET THE REQUIREMENTS OF SECTION 250(d) OF THE REVENUE ACT OF 1921 BECAUSE NOT A CONSENT TO A "LATER DETERMINATION, ASSESSMENT, AND COLLECTION OF THE TAX."

The waiver is of the time for beginning distraint or suit "for the collection of the tax." Section 250(d) of the Revenue Act of 1921 provides that no suit or proceeding shall be begun after five years from the filing of the return, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax." The waiver in question is merely of the collection. It is not of the "determination, assessment, and collection" required by the statute.

The question here involved is before this Court in the case of *Stange* v. *United States, supra*, and related cases. Counsel asks leave to refer to briefs filed therein.

The petitioner submits that Section 250(d) of the Revenue Act of 1921 is to be construed according to its express terms to mean that the statute of limitations is not extended unless the consent is to a later determination, assessment and collection of the tax. The statute expressly provides that no suit or proceeding for the collection of the tax shall be begun after the expiration of the five years from the filing of the return unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection. Congress has seen fit to provide a definite period of five years for the beginning of the suit or proceeding and has expressly provided as the only exception thereto a consent to the determination and assessment as well as to the collection of the tax. In order for the respondent to avail itself of the exception to the statute, it must show that the case comes within the express provisions of the exception. This court in *United States* v. *Merriam*, 263 U. S. 179, 44 S. Ct. 69, stated:

> "* * * But in the statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

The express terms of Section 250(d) have no uncertain meaning. The section expressly requires that the consent be to a later determination and assessment as well as to collection. In *United States* v. *Updike*, 281 U. S. 489, 50 S. Ct. 367, decided May 19, 1930, this Court stated:

> "It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitation embodied therein*, to be construed liberally in favor of the taxpayer. Bowers v. New York & Albany Co., 273 U. S. 346, 349."

In *Rock Island A. & L. R. R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, this Court stated:

> "* * * At all events *the words are there in the statute* and the regulations, and the Court is of the opinion that they mark the conditions of the claimant's right."

Had Congress intended the consent to be merely to the assessment or to the collection of the tax after the five-year period, it would have so provided and would have caused the statute to read, consent to assessment or collection just as it did in Section 906(e) of the Revenue Act of 1926. It may be that a consent to a later determination and assessment was not necessary, but this fact should not cause the Court to give the statute a construction in conflict with its express terms. The requirement of the statute is a waiver of determination and assessment as well as of collection and it is beyond the authority of the Commissioner of Internal Revenue to waive the express requirement and the courts are not authorized to read it out of the statute. In the case of *Lucas, Commissioner* v. *The Pilliod Lumber Company*, 281 U. S. 245, 50 S. Ct. 297, decided April 14,

1930, it was held that an unverified tax return was not sufficient to start the running of the statute of limitations although the return was otherwise sufficient. In the course of the opinion this Court stated:

> "* * * *No officer had power to substitute something else for the thing specified.* The return so long as it remained unverified by oath of proper corporate officers did not meet the plain requirements. The necessity for meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation was distinctly pointed out in Florsheim Bros. etc. v. United States, supra."

The petitioner submits that Congress has seen fit to provide a period of limitation of five years for the beginning of a suit or proceeding for the collection of a tax and has further provided as the only exception thereto a consent to a later determination, assessment and collection and that in order for the respondent to avail itself of the benefit of the exception contained in the statute it must show that the express terms and provisions inserted by Congress have been complied with. The consent in writing filed in this case does not comply with the provisions of the exception in the statute and is therefore not sufficient to meet the requirements of the statute.

## POINT H.

## THE PROVISIONS OF SECTION 611 OF THE REVENUE ACT OF 1928 DO NOT APPLY.

**The consent of The United States to be sued is given by Section 145 of the Judicial Code and not by Section 607 of the Revenue Act of 1928 and the case does not come within the provisions of Section 607 nor of the exception thereto in Section 611 of the same Act:**

In the brief for petitioner in the case of *Percival E. Magee* v. *United States,* supra, counsel has taken the position that

Section 611 is merely an exception to Section 607 of the Revenue Act of 1928 and is one of the mandatory administrative provisions which make it the duty of the Commissioner of Internal Revenue to credit or refund an overpayment and that the section is not a limitation on the authority of the Commissioner under Section 3220 of the Revised Statutes to remit or pay back a tax illegally collected nor is Section 611 a limitation on the petitioner's right to sue. Argument in support of this position appears at pages 5 to 15 of the brief and counsel begs leave to refer thereto.

**Section 611 does not withdraw the consent of The United States to be sued:**

Congress has by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes, neither of which was amended by the Revenue Act of 1928, given the consent of the United States to be sued by the petitioner in the Court of Claims and this consent has not been withdrawn by Congress in the enactment of Sections 607 and 611 of the Revenue Act of 1928. The question here involved is, therefore, not the right of Congress to withdraw the consent to the United States to be sued. If Section 611 is to be given the construction for which the respondent contends the question would be the right of Congress to provide that the United States should retain the property of the petitioner contrary to the provisions of the Fifth Amendment to the Constitution.

The position of the respondent is, however, that by the enactment of Sections 607, 611 and 612 of the Revenue Act of 1928, Congress has withdrawn the consent of the United States to be sued by the petitioner in the Court of Claims and that in doing so Congress was acting within the power vested in it as the legislative branch of the Government of the United States. In order for the respondent to be consistent it must necessarily take the same position with reference to the actions that have been brought against the several col-

lectors. It must also contend that the right to sue these collectors has been denied.

An action against the United States for the recovery of an amount illegally collected as a tax is for a money judgment to be satisfied from an appropriation made for the purpose. The parties are the claimant and the United States. No public officer has any interest therein and it is not necessary that any public officer certify the judgment for payment or direct that it be paid.

An action against a collector, such as brought in *Graham and Foster, copartners, etc.* v. *Goodcell*, No. 36, October Term, 1930, and *Daniel Reeves, Inc.* v. *Anderson*, No. 463, October Term, 1930, is purely personal between the plaintiffs therein and the collectors. *Sage* v. *United States*, 250 U. S. 33, 39 S. Ct. 415; *Smietakana* v. *Indiana Steel Co.*, 257 U. S. 1, 42 S. Ct. 1; *Conant* v. *Kinney*, 162 Fed. 581, affirmed 166 Fed. 720, certioari denied 214 U. S. 526, 29 S. Ct. 703. As stated by this Court in *Sage* v. *United States*, supra:

> "At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself."

The petitioner submits that the consent of the United States to the bringing of an action against a collector is not necessary. The United States can neither consent nor refuse to consent to the bringing of the action for the simple reason that the United States is a stranger to it and is in no way interested in it.

It is the position of the petitioner that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Graham & Foster* v. *Goodcell*, 35 F. (2d) 586, and the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Daniel Reeves, Inc.* v. *Anderson*, decided

July 21, 1930, in so far that they hold that actions may not be maintained against the collectors because of the lack of the consent of the United States to be sued, are entirely erroneous and are based on a complete misunderstanding of the nature of the action and of the parties thereto. An action against a collector being a personal one between him and the plaintiff does not in any manner involve the United States. The United States is not a party, the collector can not be sued in an official capacity nor can a collector be sued for the act of his predecessor in office. The action is purely personal.

The United States becomes interested not at all in the suit nor in the issuance of a certificate of probable cause under Section 989 of the Revised Statutes unless and until the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in the exercise of the authority and discretion conferred by Section 3220 of the Revised Statutes has certified or directed the payment of the judgment obtained against the collector. *Frerichs* v. *United States*, 21 Ct. Cl. 16, aff'd. 124 U. S. 315.

In *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542, the District Court for the Western District of Pennsylvania stated:

> "* * * the suit is not against the United States but a personal action against the Collector based upon his illegal collection. The United States is interested not at all until and except its proper executive officer, in the exercise of a discretion conferred upon him by statute, adopts the liability of the Collector as that of the United States. *Sage* v. *United States*, 250 U. S. 33."

In the enactment of Section 619(b) of the Revenue Act of 1928, by which Section 3220 of the Revised Statutes was amended to read in part "Except as otherwise provided by law, * * *" Congress placed a limitation on the authority and discretion of the Commissioner of Internal Revenue to repay to any collector or deputy collector the full amount

of such sums of money as may be recovered against him in any court and had Section 619(b) itself not been repealed the Commissioner of Internal Revenue would now have no authority to repay a collector the amount of a judgment rendered against him in a case in which an abatement claim had been filed and to which the provisions of Section 611 apply.

Congress was apparently aware of the fact that by the enactment of Section 619(b )it had complicated the administration of the tax laws and had placed a collector in the awkward position of being liable for a judgment against him personally which the Commissioner of Internal Revenue was prohibited from repaying. Under the circumstances it was necessary for Congress to repeal Section 619(b) and to re-enact Section 3220 of the Revised Statutes to give the Commissioner of Internal Revenue full and complete authority to repay a collector the amount of a judgment rendered against him with or without a certificate of probable cause.

The position of the respondent that the petitioner can not sue either the United States in the Court of Claims or the collector personally in a district court without the consent of Congress is unsound. Congress has no concern with an action against a collector in his personal capacity and it would be illogical to assume that Congress intended Section 611 to have any application to an action against a collector. That Congress has not attempted to withdraw the consent of the United States to be sued is too apparent for argument.

A far more tenable position for the respondent would be, as stated by the Ways and Mean Committee, that Section 611 "authorized the retention" of the amount illegally collected as a tax after the expiration of the statutory period therefor. By taking this position the respondent would present to the Court the only constitutional question that can arise in a suit against the United States.

The consent of the United States to be sued by the petitioner as given by Section 145 of the Judicial Code and Sec-

tion 3226 of the Revised Statutes still stands, and Congress has not in any way withdrawn the consent of the United States to be sued by any taxpayer for a tax "erroneously or illegally assessed or collected"—to quote from the latest expression of Congress on the subject in Section 3226 of the Revised Statutes. See Regulations 69 in Appendix.

**Section 611 is an administrative provision and is not to be construed to be retroactive:**

The Committee on Finance of the Senate, to which was referred H. R. 1, Internal Revenue Bill of 1928, 70th Congress, 1st Session, Report No. 960, pp. 17-18, "VIII. STRUCTURE OF NEW BILL AS COMPARED WITH PRIOR REVENUE ACTS", reported among other things:

> "Therefore, the provisions of the income tax title of the present bill apply only to the taxable year 1928 and succeeding years. They have no effect whatsoever on taxes imposed for prior taxable years, nor do the provisions of the 1926 income tax title have any effect on the computation of tax for 1928 or later years. For this reason the income tax title of the 1926 act is not repealed by the bill and remains in force for the *collection* of taxes for 1925, 1926, and 1927, as well as taxes under prior acts, except as modified by Title III of the present bill, containing express amendments to such title, and by Title IV, containing various administrative provisions, and by Title V, *containing a few retroactive provisions intended to relieve certain cases of hardship under prior acts.*
>
> It is planned ultimately to combine provisions of this general nature into a compilation or code apart from the revenue acts."

The Committee on Ways and Means of the House of Representatives, on the Revenue Bill of 1928, Report No. 2, pp. 11-12, "STRUCTURE OF NEW BILL AS COMPARED WITH PRIOR REVENUE ACTS," reported in part:

> "Therefore, the provisions of the income tax title of the present bill apply only to the taxable year 1927 and succeeding years, and have no effect whatsoever on taxes imposed for prior taxable years. For this reason the income tax title of the 1926 Act is not repealed by the bill and remains in force for the collection of taxes for 1925 and 1926, as well as taxes under prior Acts, except as modified by Title III of the present bill, containing express amendments to such title, and by Title IV containing various administrative provisions, and by Title V, containing a few retroactive provisions intended to relieve certain cases of hardship under prior acts."

At this juncture and in view of the importance of the possible effect of Section 611 of the Revenue Act of 1928, in conjunction with, or separate and apart from, such sections of the same Act as Sections 607, 608, 609 and 610, relating to the effect of the running of the statute of limitations, we here state that these Sections appear in Title IV containing various *administrative provisions,* and do not appear in "Title V containing a *few retroactive provisions* intended to relieve certain cases of hardship under prior acts," viz:

Section 702 entitled "Basis of Property upon Sale by Estate—*RETROACTIVE.*"

Section 703 entitled "Deduction of Estate and Inheritance Taxes—*RETROACTIVE.*"

Section 704 entitled "Taxability of Trusts as Corporations.—*RETROACTIVE.*"

Section 705 entitled "Installment Sales—*RETROACTIVE.*"

Section 706 entitled "Contributions to Charity—*RETROACTIVE.*"

Section 705(b) is as follows:

> "Nothing in this section shall be construed as in any manner modifying sections 607, 608, 609 or 610 of this chapter, relating to the effect of the running of the statute of limitations."

Section 716 of the Revenue Act of 1928 entitled "Effective Date of Act" reads:

> "Except as otherwise provided, this Act shall take effect upon its enactment." Approved May 29, 1928, 8:00 A. M.

"Section 611. Collections Stayed by Claim in Abatement."

As this Section, being Section 611 of c. 852, 45 Stat. of the Revenue Act of 1928, appears in Chapter 24, Title IV and in accordance with the provisions of Section 716, supra, it "*shall take effect upon its enactment,*" namely, May 29, 1928.

**Section 611 is not to be construed to apply to a case in which the tax was collected after the enactment of Section 1106(a) of the Revenue Act of 1926 and while the section was in force:**

By section 1106(a) of the Revenue Act of 1926 (44 Stat. 113) Congress provided that the bar of the statute of limitations against the United States in respect to the tax shall not only operate to bar the remedy but shall extinguish the liability. The liability for the amount of the tax here in question was, therefore, expressly extinguished by an Act of Congress on February 26, 1926, and the subsequent collection of the amount of the tax from the petitioner was unauthorized and illegal and was made at a time when no liability therefor existed. The lower courts have uniformly held that the amount of a tax collected after the liability therefor had been expressly extinguished by Section 1106(a) can be recovered from the United States and that the provisions of Section 611 of the Revenue Act of 1928 do not apply. *Wyman, Partridge & Company* v. *United States,* 41 F. (2d) 886, certiorari granted October 20, 1930, *Wettengel* v. *Robinson, et al.,* 300 Pa. 355, 150 Atl. 658, Supreme Court of Pennsylvania; *Diamond Alkali Company* v. *Heiner,* 39

F. (2d) 643; and *Clinton Iron & Steel Company* v. *Heiner*, 30 F. (2d) 542.

The question here involved is before this Court in *United States* v. *Wyman, Partridge & Company*, supra, and counsel begs leave to refer to the brief filed by the respondent therein.

**The collection of the tax was never stayed:**

The requirements of Section 611 are the assessment of the tax, the filing of the claim in abatement, "and if the collection of any part thereof was stayed, then, the payment of such part * * * shall not be considered an overpayment * * *." The section applies only in the case of stay and only to the extent of that part of the tax the collection of which "was stayed."

Congress has used the word "stayed" which is a word having a well defined and judicially settled legal meaning. The only meaning that the word can have is that the collector was stopped or prevented from collecting the tax. *United States* v. *Burden, Smith & Company*, 35 F. (2d) 229. In *Crooks* v. *Harrelson, et al.*, 35 F. (2d) 416, certiorari granted 50 S. Ct. 237, the Circuit Court of Appeals, Eighth Circuit, said:

> "* * * *in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used.* If the words are doubtful the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211.

The rule is stated by Lord Cairns in Partington v. Attorney-General, L. R. 4, H. L. 100, 122:

> 'I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it

> is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute.' And see Eidman v. Martinez, 184 U. S. 578, 583 (22 S. Ct. 515, 46 L. Ed. 697.)"

In *William F. Taubel, Inc.* v. *Sturges,* decided November 8, 1930, District Court of New Jersey, it is stated:

> "A reasonable view to take concerning the meaning of the word 'stay' is; that it connotes a state of facts either under rules and regulations or under stipulations made pursuant thereto which would in effect restrain the collector from making collection pending the decision of a claim."

In this case the return was filed in August, 1919, and the first abatement claim was filed in December, 1919, and the second during the month of July, 1920. These claims were allowed for $19,053.70 and rejected for $32,135.24 but the record is silent as to the date of rejection. After the filing of the claim in abatement in July, 1920, no effort was made by the collector to collect the tax until May 28, 1926, almost six years after the claim in abatement was filed. The demand made on May 28, 1926, was promptly followed by payment within ten days. There appears in the record absolutely nothing to disclose that the collection was stayed or even so much as delayed by the filing of the abatement claim and there is nothing to disclose that the collector could not have made collection at any time that he so desired. On the contrary the record clearly discloses that all demands of the collector were promptly complied with and that all negli-

gence or delay was his. Further the record is silent as to the provisions or the bases of the claims in abatement. The findings of the court below disclose simply that the claims in abatement were filed and allowed in part by the Commissioner.

In briefs filed in *Magee* v. *United States*, supra, and in *Oak Worsted Mills* v. *United States*, S. Ct. No. 104, October Term, 1930, counsel have taken the position that the mere filing of a claim in abatement does not stay the collection of the tax for the simple reason that there is nothing to prevent the collector's proceeding to make the collection at any time that he so desires. In addition to what is said in briefs in the cases referred to counsel desires to call attention to Article 1272 of Regulations 65, supra, which when read with Article 261 of Regulations 33 and Article 1032 of Regulations 62 discloses, that collection was held up, not because of the filing of the claim in abatement, which the Regulations prescribe shall not suspend the collection of the tax, but because the Commissioner of Internal Revenue and the collector construed Section 278(d) of the Revenue Act of 1924 to mean that the collector had the full period of six years from the assessment of the tax in July, 1920, in which to make collection. The Commissioner's misunderstanding clearly appears in Article 1272 of Regulations 65 and further appears from the fact that in this case, he actually so interpreted Section 278(d) of the Revenue Act of 1924 and obtained a waiver from the petitioner in which specific reference is made to that section of the Revenue Act of 1924.

All that has occurred in this case is that the Commissioner of Internal Revenue and the collector of internal revenue labored under the impression that the period of limitation for the collection did not expire until August, 1926, and they thought that they were fully protected by the waiver obtained to expire December 31, 1926. It was not until the decision of this Court in the case of *Russell* v. *United States*, supra, that the Commissioner of Internal Revenue became aware of his error.

The petitioner submits that collection in this case was not stayed nor even delayed because of the filing of the abatement claims but because of the Commissioner's misunderstanding of the provisions of the revenue acts and because of his erroneous belief that he had until August, 1926, in which to make collection. Whether the claims in abatement were rejected during the year 1920 or during the year 1926 does not appear in the findings of fact but the Court will note that the Commissioner of Internal Revenue had from the time of the filing of the last claim in abatement the full period of four years before the expiration of the statute of limitations within which to act on it and to collect the amount for which he rejected it.

The question of stay is one of fact and the burden is on the respondent to disclose that collection was in fact stayed beyond the limitation period for collection. In this case there is nothing in the record to support the position of the respondent and the respondent has not borne the burden of proving stay. The mere fact that the claims in abatement were filed, standing alone and in the absence of proof that they were under consideration by the Commissioner of Internal Revenue until after the expiration of the statute of limitations, is not sufficient to make out a case for the respondent under Section 611 of the Revenue Act of 1928.

**The tax was forcibly collected from the petitioner and payment was not voluntary as contemplated by Congress by the use of the word "payment":**

In support of its position that Section 611 is to be construed to apply to voluntary payments only counsel begs leave to refer to brief of petitioner in *American Glue Company* v. *United States*, S. Ct. No. 519, October Term, 1930.

## POINT I.

## TO THE EXTENT THAT IT MIGHT OTHERWISE BE CONSTRUED TO APPLY SECTION 611 HAS BEEN REPEALED BY SECTION 3220 OF THE REVISED STATUTES, A LATER ACT. SECTION 619(b) HAS BEEN REPEALED IN ITS ENTIRETY.

In the brief for the petitioner in the case of *Percival E. Magee* v. *United States*, supra, counsel called attention to the re-enactment of Section 3220 of the Revised Statutes and to the fact that, in so far as Section 611 of the Revenue Act of 1928 might otherwise be construed to limit the authority of the Commissioner of Internal Revenue to make a refund of a tax illegally collected or of the right of the petitioner to obtain such refund, Section 611 of the Revenue Act of 1928 has been repealed and superseded by Section 3220 of the Revised Statutes, as amended by Act of May 29, 1928, c. 901, sec. 3, 45 Stat. 996, a later act. In the brief in that case counsel also called attention to the errors in the United States Code, Supplement III, Title 26, Sec. 149, and to the further fact that in Regulations 74 promulgated for the enforcement of the Revenue Act of 1928, the Treasury Department for the first time in the promulgation of any of the regulations for the enforcement of a revenue act, made no reference to Section 3220 of the Revised Statutes other than to quote Section 619(b), 45 Stat. 878, of the Revenue Act of 1928, which had however been repealed in its entirety by Section 3220 of the Revised Statutes as amended.

Since filing the brief in the *Magee* case counsel's attention has been called to United States Code Annotated, Pamphlet Supplement Cumulative, Acts of 70th Congress, First Session, with annotations to July 1, 1928, published by West Publishing Company and Edward Thompson Company, in which Section 3220 of the Revised Statutes, as amended May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, is printed as enacted by the later act and as set forth at page 22 of petitioner's brief in Magee case. Following Section 3220 of the Revised

Statutes, as amended, there appears in the pamphlet the following annotation:

> "This section (section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926), was also amended by Act May 29, 1928, 8:00 a. m. c. 852, 619(b), 45 Stat. ——, by striking out 'Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926' and inserting in lieu thereof 'Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes."

In the pamphlet the latest act of Congress is correctly set forth and with the proper explanation in the annotation. In the supplement to the Code which was later published, there was erroneously included Section 3220 of the Revised Statutes as it had been formerly amended by Section 619(b) of the Revenue Act of 1928.

**The decisions of the Circuit Courts of Appeals in Huntley v. Gile & Jenks, etc.; Daniel Reeves, Inc., v. Anderson; and Wright and Taylor, Inc., v. Lucas:**

In the case of *Huntley* v. *Gile & Jenks*, etc., 32 F. (2d) 857, followed in *Graham and Foster* v. *Goodcell*, supra, the Circuit Court of Appeals for the Ninth Circuit with reference to Section 611, stated:

> "While textually Section 611 is open to construction upon the whole we are left in no doubt that by it Congress intended to withhold from the taxpayer the right to have *refunded* money paid by him in the discharge of a valid tax. * * *"

The court avoided making any reference to Section 619(b) of the Revenue Act of 1928 and was apparently unaware of that fact that Section 3220 of the Revised Statutes had been amended and re-enacted subsequently to the enactment of the Revenue Act of 1928 and that Section 619(b) of the

Revenue Act of 1928 was thereby repealed in its entirety and that Section 611 to the extent that it might otherwise have had any bearing on the right of the appellant to the refund had also been repealed. Certainly the court would not have reached the conclusion that Congress intended to withhold from a taxpayer the right to a refund had its attention been called to the fact that Congress had in a statute, later than Section 611, expressly authorized the Commissioner of Internal Revenue to make such refund.

In the case of *Daniel Reeves, Inc.* v. *Anderson,* decided July 21, 1930, supra, Judge L. Hand of the Second Circuit likewise avoided any reference to Section 619(b) of the Revenue Act of 1928 or to Section 3220 of the Revised Statutes and reached the conclusion, in direct conflict with the express provisions of Section 3220 of the Revised Statutes, that the Commissioner of Internal Revenue was prohibited from making the refund and held that for that reason suit could not be entertained. The attention of the learned Judge was apparently not called to the fact that Section 3220 had been amended and re-enacted.

The reasoning of the court that Section 611 forbids the making of a refund by the Commissioner of Internal Revenue and must also be construed to forbid a suit to recover a tax illegally collected, is entirely erroneous and all logic in support of it fails when it is considered that Section 3220 of the Revised Statutes, as amended by the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, a later enactment, restores to the Commissioner of Internal Revenue the full and complete authority which was by any possibility taken from him by Sections 611 and 619(b) of the Revenue Act of 1928.

In *Wright and Taylor, Inc.* v. *Lucas,* decided November 10, 1930, by the Circuit Court of Appeals for the Sixth Circuit the case of *Daniel Reeves, Inc.* v. *Anderson,* supra, was followed and the court likewise gave no consideration to the fact that Section 3220 of the Revised Statutes had been amended and re-enacted by the Act of May 29, 1928, c. 901,

Sec. 3, 45 Stat. 996, and during the course of its opinion the court stated:

> "It (Section 611) was intended to cut off any claim for the refund of such taxes at its very roots."

In the cases referred to the attention of the courts was apparently not called to the provisions of Section 619(b) of the Revenue Act of 1928, which are however, closely related to those of Sections 611 and 612 and further the attention of the courts was not called to the fact that Section 3220 of the Revised Statutes had been reenacted and amended subsequently to the enactment of the Revenue Act of 1928 and that Section 619(b) of the Revenue Act was thereby repealed in its entirety and that the provisions of Section 611, in so far as they might otherwise have any bearing on the authority of the Commissioner of Internal Revenue to refund or to pay back a tax illegally collected, were likewise repealed. The petitioner submits that the decisions of these courts are not based on the provisions of the latest act of Congress and should therefore be given no weight by this Court when it comes to consider the provisions of Sections 607, 611, 612 and 619(b) of the Revenue Act of 1928 and of Section 3220 of the Revised Statutes as amended by the Act of May 29, 1928, c. 901 Sec. 3, 45 Stat. 996.

## POINTS J AND K.

**SECTION 611 OF THE REVENUE ACT OF 1928 IF CONSTRUED TO APPLY TO THIS CASE, IN WHICH THE TAX WAS COLLECTED AFTER THE ENACTMENT OF 1106(a) OF THE REVENUE ACT OF 1926, WOULD DEPRIVE THE PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT.**

**AND**

**IT WAS BEYOND THE POWER OF A SUBSEQUENT CONGRESS IN THE ENACTMENT OF SECTION 612 OF THE REVENUE ACT OF 1928 TO REPEAL SECTION 1106(a) AS OF FEBRUARY 26, 1926, TO DISTURB THE PETITIONER'S RIGHT TO RECOVER A TAX PAID AFTER THE LIABILITY THEREFOR HAD BEEN EXTINGUISHED BY THE BAR OF THE STATUTE OF LIMITATIONS.**

The petitioner's return was filed in August, 1919, and the assessment of the additional tax, which was later illegally collected from the petitioner, was made during the month of July, 1920. The applicable period of limitation under the decision of this Court in the case of *Russell* v. *United States*, supra, is therefore the five-year period defined in Section 250(d) of the Revenue Act of 1921. This period expired in August, 1929. The additional tax was collected from the petitioner on June 8, 1926, and after the enactment of the Revenue Act of 1926. Section 1106(a) of the Revenue Act of 1926 as applicable here reads as follows:

> "The bar of the statute of limitations against the United States in respect to any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. * * *"

The occasion for the enactment of Section 1106(a) was the decision of the Court of Claims in the case of *Toraway Mills* v. *United States, supra*, and the intent of Congress was to prevent the decision of the Court of Claims from becoming a precedent. The purpose of the enactment was declared in Conference Report on the revenue bill of 1926, House Report No. 356, page 55, 69th Congress, First Session, as follows:

> "This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability."

The bar of the statute of limitations referred to in Section 1106(a) of the Revenue Act of 1926 is, as applied to this case, that contained in Section 250(d) of the Revenue Act of 1921.

At the time the additional tax here in question was collected Section 1106(a) was in force and the tax was collected after the liability had been extinguished and after the tax had ceased to exist. The petitioner therefore submits that to construe Section 611 of the Revenue Act of 1928 to apply to this case would cause it to violate the provisions of the Fifth Amendment to the Constitution and would amount to the deprivation of property without due process of law and to the taking of property without compensation. The liability for the tax having been extinguished the amount of the tax thereby became the property of the petitioner and the collection of the amount from it amounted to the deprivation of property without due process of law and to the taking of property without compensation.

By Section 612 of the Revenue Act of 1928, Congress provided:

> "Section 1106(a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

The petitioner submits that it was beyond the power of a subsequent Congress to repeal Section 1106(a) as of February 26, 1926, to defeat the right of the petitioner to recover the amount of the tax illegally collected from it after the liability therefor had been extinguished by the bar of the statute of limitations. The position of the petitioner has been sustained by the decisions of all of the lower courts which have passed on the question. These decisions are *Dobbins* v. *Commissioner*, 31 F. (2d) 935,

Third Circuit; *United States* v. *John Barth Company*, 27 F. (2d) 782, reversed on other grounds, 279 U. S. 370, 49 S. Ct. 366, Seventh Circuit; *Wyman, Partridge & Company* v. *United States, supra*, Court of Claims, certiorari granted October 20, 1930; *Wettengel* v. *Robinson et al., supra*, Supreme Court of Pennsylvania for the Western District; *Pepsin Syrup Company* v. *Schwaner*, 35 F. (2d) 197, District Court of Illinois; *Diamond Alkali Company* v. *Heiner, supra, and Peerless Woolen Mills* v. *Commissioner*, 13 B. T. A. 1119.

Section 1106(a) of the Revenue Act of 1926 and 612 of the Revenue Act of 1928 came under the consideration of the Supreme Court of Pennsylvania for the Western District in *Wettengel* v. *Robinson et al., supra*, trustees in a suit in equity to collect income taxes from the statutory liquidators of the corporation. In the course of its opinion the court made the following statement with reference to the constitutionality of Section 612 of the Revenue Act of 1928:

> "* * * the Government points to section 612 of the Revenue Act of May 29, 1928, which provides that 'Section 1106(a) of the Revenue Act of 1926, is repealed as of February 26, 1926,' that is, as of the date of its passage. Undoubtedly that provision would be effective as to all taxes the liability for which had not been extinguished prior to the passage of the Act of 1928, but would it as to those where it had? The court below, relying on *Dobbins* v. *Commissioner of Internal Revenue*, 31 Fed. (2d) 935, decided it would not. In construing section 612, it was there said that it 'did not revive a dead liability or create a new obligation.' The same conclusion was reached in *United States* v. *John Barth Co.*, 27 Fed. (2d) 782; *Erie Coal & Coke Co.* v. *Heiner*, 33 Fed. (2d) 135, and *Pepsin Syrup Co.* v. *Schwaner*, 35 Fed. (2d) 197. True, the first of these cases was reversed in *United States* v. *John Barth Co.*, 279 U. S. 370, but the Supereme Court expressly refused to pass upon the Government's con-

tention that the Act of 1928 'restores and gives life to the tax retrospectively.' A search fails to disclose any opinion by the Supreme Court of the United States, or by any federal Circuit Court of Appeals, which reaches a different conclusion from that of the court below. *Campbell* v. *Holt,* 115 U. S. 620, relied on by the Government, simply decides that a statute which limits the time within which suit may be brought, may be repealed, although in the particular case under consideration, the statutory limitation had run before the repealing statute was passed. Its effect as a precedent has been limited, however, to cases where the repealed statute was purely one of limitation. On this point see *William Danzer & Co.* v. *Gulf and Ship Island R. R. Co.,* 268 U. S. 633, where *Campbell* v. *Holt* is distinguished, and it is held that if a statute both creates the liability and limits the time within which suit may be brought, the limitation cannot be repealed after the right to sue has been lost, because (page 637) the 'effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment.' "

This Court in the case of *De Lima* v. *Bidwell,* 182 U. S. 199, speaking through Mr. Justice Brown, said:

"* * * *the right to recover the money sued for could not be taken away by a subsequent act of Congress.*

Plaintiffs sue in assumpsit for money which the Collector has in his hand, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. * * *"

## CONCLUSION.

In conclusion the petitioner submits

1. The deposit with the bank was made merely to insure the illegal collection of the amount of the tax after the expiration of the statutory period and gave rise to no pri-

mary liability and this case should be decided on the basis of the applicable provisions of the revenue acts and not on the basis of any supposed conditions or provisions in an agreement between the petitioner and the collector or between the bank and the collector.

2. The consent in writing having been given after the expiration of the five-year period for collection and after the liability for the tax had been extinguished is of no force and effect.

3. The consent in writing was for the extension of a statutory period for collection which has no application and was entered into under a mistake of law and is therefore of no force and effect and can not be corrected or reformed to refer to the proper limitation period.

4. The consent in writing is not sufficient to meet the requirements of Section 250(d) of the Revenue Act of 1921 because not a consent to a "later determination, assessment, and collection of the tax."

5. The provisions of Section 611 of the Revenue Act of 1928 have no application because the petitioner filed its claim for refund under Section 3220 of the Revised Statutes and brought suit under Section 145 of the Judicial Code and 3226 of the Revised Statutes and not under Section 607 of the Revenue Act of 1928. Further, the provisions of Section 611 do not apply because the collection of no part of the tax was "stayed."

6. To the extent that it might otherwise be construed to limit the authority of the Commissioner of Internal Revenue to remit or pay back the amount of the tax illegally collected or to in anywise affect the right of the petitioner to its recovery, Section 611 has been repealed and superseded by the later Act of Congress in Section 3220 of the Revised Statutes, as amended by Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996.

7. Section 611 of the Revenue Act of 1928 if construed to apply to this case in which the tax was collected after

the enactment of Section 1106(a) of the Revenue Act of 1926 would deprive the petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution.

8. It was beyond the power of the subsequent Congress in the enactment of Section 612 of the Revenue Act of 1928 to repeal Section 1106(a) of the Revenue Act of 1926 as of February 26, 1926, to disturb the petitioner's right to recover a tax paid after the liability therefor had been extinguished by the bar of the statute of limitations.

Respectfully submitted,

THEODORE B. BENSON,
*Counsel for Petitioner.*

*Of Counsel:*
WILLIAM MEYERHOFF.

## APPENDIX

The position of the petitioner that the right to sue the United States is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes is fully supported by the Regulations of the Commissioner of Internal Revenue promulgated for the enforcement of Section 3226, as last amended by the Revenue Act of 1926. Article 1351 of Regulations 69, which is substantially the same as Article 1351 of Regulations 64, reads as applicable here:

> "Section 3226 of the Revised Statutes, as amended, *outlines the only manner in which a suit may be brought* by any person for the recovery of taxes erroneously or illegally assessed or collected or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any person bringing such suit or proceeding is required. * * *"

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FILED
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No. 400

# In the Supreme Court of the United States

OCTOBER TERM, 1930

MASCOT OIL COMPANY, INC., PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**MEMORANDUM FOR THE UNITED STATES**

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---

## MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the petition in this case.

### OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 42 F. (2d) 309.

### JURISDICTION

The judgment sought to be reviewed was entered on June 2, 1930. (R. 16.) The petition for certiorari was filed on August 27, 1930. (R. 16.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether the petitioner is deprived of the right it would otherwise have had to recover taxes col-

lected after the statutory period of limitations had expired, because after the statutory period for collection of a tax for 1918 had expired it made a deposit of cash in escrow as a guaranty of payment of the tax as finally determined.

2. Whether Sections 611 and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, operate to deprive it of this right.

3. Whether a waiver executed on October 11, 1925, justified the collection.

STATUTES INVOLVED

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113 (U. S. C. App., Title 26, sec. 1249), provides:

> SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Sections 611 and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, provide:

> SEC. 611. *Collections Stayed by Claim in Abatement.*—If any internal-revenue tax

(or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. [U. S. C., Supp. III, Title 26, sec. 2611.]

SEC. 612. *Repeal of Section 1106 (a) of 1926 Act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. [U. S. C., Supp. III, Title 26, sec. 2612.]

**STATEMENT**

In August, 1919, the petitioner filed its income and profits tax return for the year 1918. (R. 11.) In December, 1919, the petitioner filed a claim in abatement for the year 1918. (R. 11.) In July, 1920, the Commissioner of Internal Revenue assessed an additional tax against the petitioner. (R. 11.) In August, 1920, a second claim in abatement was filed by the petitioner covering the years 1917 and 1918. (R. 11.) In August, 1924, the five-year period for assessment for collection of the 1918 tax expired. On September 18, 1925, the petitioner deposited in a bank in escrow a sum of

money to insure payment of the tax finally determined to be due for the years 1917 and 1918. (R. 11.) On October 10, 1925, the depositary wrote the Collector of Internal Revenue that it was authorized by the petitioner to pay the Collector up to $65,000 upon his final determination of the petitioner's tax for 1917 and 1918 and that such payment would be made upon the Collector's demand. (R. 12.) On June 8, 1926, the petitioner, upon demand, paid the tax of 1918; and the Collector withdrew all claim to the deposit. (R. 12.) On October 28, 1928, the petitioner filed a claim for refund for the amount of additional tax paid for the year 1918 on the ground that the taxes were collected after the expiration of the period of limitation. (R. 13.) This claim was rejected by the Commissioner (R. 13), and this suit was brought by the petitioner in the Court of Claims on February 27, 1929. That court dismissed the petition.

The Government urged in the court below that the collection on June 8, 1926, was justified, not only because of the escrow agreement but also because of a waiver as to the collection of the tax, executed on October 11, 1925. The only statement in regard to this waiver in the Findings of the Court of Claims is the following, under paragraph 5 (R. 12):

> On the day following that on which the deposit was made in the bank, as hereinabove recited, the plaintiff and the commis-

> sioner signed an income and profits tax waiver, whereby the taxpayer waived "any period of limitation as to the time within which distraint or a proceeding in court may be begun for the collection of the tax," as provided in section 278 (d) of the existing revenue act for the years 1917 and 1918, the same to remain in effect until December 31, 1926.

That court did not decide what effect this waiver had. The Government does not at this time intend to remove this question from the case.

DISCUSSION

The Court of Claims held on the authority of *United States* v. *John Barth Co.*, 279 U. S. 370, that the collection was by virtue of the deposit of guaranty and not by reason of the tax liability, and that therefore there could be no recovery. Since this decision is apparently in conflict with that of the Circuit Court of Appeals for the Third Circuit in *Heiner* v. *Erie Coal & Coke Co.*, 42 F. (2d) 214, in which the Government is petitioning for a writ of certiorari on behalf of the Collector (No. 508), we do not oppose the issuance of the writ in this case. In the *Erie Coal & Coke case* the taxpayer executed a bond guaranteeing the payment of the tax, but the court nevertheless entered a judgment allowing the taxpayer to recover the payment which it had made.

If the decision of the Court of Claims on this point is not sound, the case raises the same point

involving the effect of Section 1106 (a) of the Revenue Act of 1926 as is presented in the case of *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, now pending on petition for certiorari to the Court of Claims. In that case, as in the instant case, the payment was made after the passage of the Revenue Act of 1926. The related question of the effect of Section 611 of the Revenue Act of 1928 is already before the Court in the following cases where the collection was made before the enactment of the Revenue Act of 1926: *Graham and Foster, Co-partners, etc.*, v. *Goodcell, Collector*, No. 36, October Term, 1930, certiorari granted, March 3, 1930; *Magee* v. *United States*, No. 65, October Term, 1930, certiorari granted, May 19, 1930; *Oak Worsted Mills* v. *United States*, No. 104, October Term, 1930, certiorari granted, June 2, 1930; and *Taft Woolen Company* v. *United States*, No. 105, October Term, 1930, certiorari granted, June 2, 1930; and several other cases now pending on taxpayers' petitions for certiorari which the Government has not opposed. The facts in the instant case are similar to those in the above cases. In three of them suit was brought before the passage of the Act of 1928, but the instant case and the *Magee case* were brought after its passage.

## CONCLUSION

In view of the fact that this case involves questions which are involved in other cases now before

the Court, the United States does not oppose the granting of the writ.

Respectfully submitted.

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CLAUDE R. BRANCH,
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OCTOBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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**BRIEF FOR THE UNITED STATES**

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 42 F. (2d) 309.

### JURISDICTION

The judgment of the Court of Claims was entered June 2, 1930. (R. 16.) The petition for certiorari was filed August 27, 1930 (R. 16), and certiorari was granted October 27, 1930. (R. 17.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the petitioner is deprived of the right it would otherwise have had to recover taxes collected after the statutory period of limitations had expired, because after the statutory period for collection of a tax for 1918 had expired it made a deposit of cash in escrow as a guaranty of payment of the tax as finally determined.

2. Whether Sections 611 and 612 of the Revenue Act of 1928 operate to deprive it of this right.

## STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 9–11.

## STATEMENT

In August, 1919, the petitioner filed its income and excess-profits tax return for the year 1918 and the amount of the tax shown thereon was timely assessed. (R. 11.) This amount, with the exception of $14,204.41, was paid during 1919, and in December, 1919, a claim in abatement of the unpaid assessment was filed. (R. 11.)

In July, 1920, the Commissioner assessed an additional amount of $38,030.51. (R. 11.) In August, 1920, the taxpayer filed a claim in abatement of this assessment. (R. 11.) On September 18, 1925, after the period for collection had expired (August, 1924), the taxpayer deposited $65,000 with a bank to insure payment of the amount finally determined to be due for the year 1918 and for another year. (R. 11.) The bank notified the

Collector of the deposit and of the bank's authorization to pay to the Collector the amount finally determined to be due and of its willingness to so pay. (R. 12.) On September 19, 1925, the taxpayer filed a waiver of the limitation period against collection as provided in the Revenue Act of 1924. (R. 12.) On March 29, 1926, a further waiver of certain provisions of the Revenue Act of 1926 was filed. On April 28, 1926, the Commissioner abated the 1918 additional assessment in part and determined the correct amount of the assessment. (R. 11, 12.)

On May 28, 1926, the Collector made demand of the petitioner for payment of $28,846.64, the amount then unpaid, and on June 8, 1926, this amount was paid by the petitioner under protest. Thereupon the Collector withdrew all claim upon the deposit which had been made to guarantee payment of the tax. (R. 12.) Claim for refund was filed October 28, 1928, and rejected. (R. 13.) Suit was instituted February 27, 1929. (R. 7.) The Court of Claims dismissed the petition. (R. 16.)

## ARGUMENT

In its opinion, the Court of Claims considered merely the effect of the deposit made by the petitioner in escrow. Brief reference was also made to a waiver executed on the day after the deposit was made, whereby the taxpayer, as the findings recite (R. 12)—

> waived "any period of limitation as to the time within which distraint or a proceed-

ing in court may be begun for the collection of the tax," as provided in section 278 (d) of the existing revenue act.

We do not rely upon this waiver because it appears to have been directed solely to the period of limitation provided by the Revenue Act of 1924. Under the decision of this Court in *Russell* v. *United States,* 278 U. S. 181, such period is not applicable to the collection of taxes assessed prior to June 2, 1924. Apparently the waiver was not broad enough to apply to the five-year limitation (prescribed by the Revenue Act of 1921) which had already expired.

An examination of another waiver referred to by the court below in Finding V (R. 12) indicates that it was a waiver authorized by Section 274 (d) of the Revenue Act of 1926 of the prohibition against the Commissioner's collecting within the sixty-day period provided by Section 274 (a) of that act. Therefore, we do not urge that this should be construed to apply to the five-year limitation which had already expired.

## I

### THE DEPOSIT OF $65,000 IN ESCROW AND THE ACCOMPANYING AGREEMENT TO PAY THE AMOUNT OF THE TAX LIABILITY PRECLUDE RECOVERY BY THE PETITIONER

The Court of Claims decided in favor of the Government on the ground that there had been substituted for the tax liability a contract to pay a certain amount when it was determined by the

Commissioner, and that an action on that contract was not barred by the statute of limitations applicable to collection of taxes. The case of *United States* v. *John Barth Co.*, 279 U. S. 370, was cited in support of the decision.

A similar question is presented in the case of *D. B. Heiner, Collector*, v. *Erie Coke & Coal Company*, now pending here on certiorari, No. 508, October Term, 1930, and assigned for argument before this case. Under Point I of its brief in that case, the Government has discussed the validity and effect of a bond given by a taxpayer under circumstances similar to those in the instant case. The present discussion, therefore, will be confined to a consideration of the distinctions between this case and the *Erie case*.

Here, as in the *Erie case*, assessment was made in time, and payment was out of time. In the *Erie case* a claim in abatement was filed after the statute of limitations had run, while here the claim in abatement was filed prior to the expiration of the statutory period for collection. In both cases, the taxpayer, after the running of the statute, entered into an agreement with the Collector to pay the amount of taxes finally determined to be due; but in the *Erie case* the agreement took the form of a surety bond, while here it was a deposit in escrow with an agreement by the bank for itself and on behalf of the taxpayer to pay. In both cases, the Collector collected from the taxpayer instead of

proceeding on the obligation. Therefore, if this Court decides that the execution of the bond in the *Erie case* precluded the taxpayer from recovering, the decision in the instant case must be in favor of the Government unless the form of the agreement constitutes a controlling distinction. We submit that it does not.

If the court below was correct in its view that the escrow deposit and accompanying agreement created a new liability, distinct from the tax assessment, the payment of that obligation was not barred by any statute of limitations. Therefore the petitioner can not recover as in the case of a tax erroneously collected.

In conclusion it may be noted that the findings do not show that payment was made under threat of distraint. (R. 12.) It is, therefore, possible to infer that the petitioner paid the tax voluntarily to secure the release of its deposit, protesting merely against the disallowance of a portion of its claim in abatement on its merits. Whatever the situation was, we contend that it can not now recover.

## II

SECTIONS 611 AND 612 OF THE REVENUE ACT OF 1928 SHOULD BE CONSTRUED TO PREVENT RECOVERY OF TAXES COLLECTED AFTER THE STATUTORY TIME FOR COLLECTION HAD EXPIRED, IF A CLAIM IN ABATEMENT WAS FILED AND COLLECTION STAYED

The Government contends that if the payment in June, 1926, was not in satisfaction of the contractual obligation arising out of the deposit in

escrow, but rather was a collection of the 1918 tax, then the facts of the instant case bring it within the terms of Section 611 of the Revenue Act of 1928, and that section is a complete defense to this suit.

Here assessments were made prior to June 2, 1924, and claims in abatement were filed within the statutory period for assessment and collection. The claims were disposed of in April, 1926.

This was subsequent to the deposit in escrow. If it be considered that the tax was paid by the deposit, then it was paid before the enactment of Section 1106 (a) of the Revenue Act of 1926 and the case will be controlled by the decision of this Court on that question in *Magee* v. *United States*, No. 65, October Term, 1930. But if the making of the deposit did not constitute payment of the tax, then the actual date of the payment being June 8, 1926, subsequent to the enactment of Section 1106 (a) of the Revenue Act of 1926, the case will be controlled by the decision of this Court in the case of *United States* v. *Wyman, Partridge & Company*, No. 416, October Term, 1930.

In the instant case the claim for refund, unlike those in all the other cases in the group, with the exception of *Boston Pressed Metal Company* v. *United States*, No. 337, was filed after the enactment of the Revenue Act of 1928. This makes inapplicable any argument that Section 611 applies only to cases where the claim for refund was filed after its enactment.

## CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*
CHARLES B. RUGG,
*Assistant Attorney General.*
CLAUDE R. BRANCH,
*Special Assistant to the Attorney General.*
GEORGE H. FOSTER,
BRADLEY B. GILMAN,
ERWIN N. GRISWOLD,
H. BRIAN HOLLAND,
*Attorneys.*

DECEMBER, 1930.

## APPENDIX

### STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 265, so far as material, provides:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect

suits or proceedings begun at the time of the passage of this Act: * * *.

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides:

> SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C., App., Title 26, Sec. 1249.)

Sections 607, 611, and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provide:

> SEC. 607. *Effect of expiration of period of limitation against United States.*
>
> Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Sup. III, Title 26, Sec. 2607.)
>
> SEC. 611. *Collections stayed by claim in abatement.*
>
> If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of

limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C., Sup. III, Title 26, Sec. 2611.)

SEC. 612. *Repeal of section 1106 (a) of 1926 Act.*

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C., Sup. III, Title 26, Sec. 2612.)

U. S. GOVERNMENT PRINTING OFFICE 1930

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# PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 416

THE UNITED STATES, PETITIONER

vs.

WYMAN, PARTRIDGE & COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

**PETITION FOR CERTIORARI FILED SEPTEMBER 2, 1930**
**CERTIORARI GRANTED OCTOBER 20, 1930**

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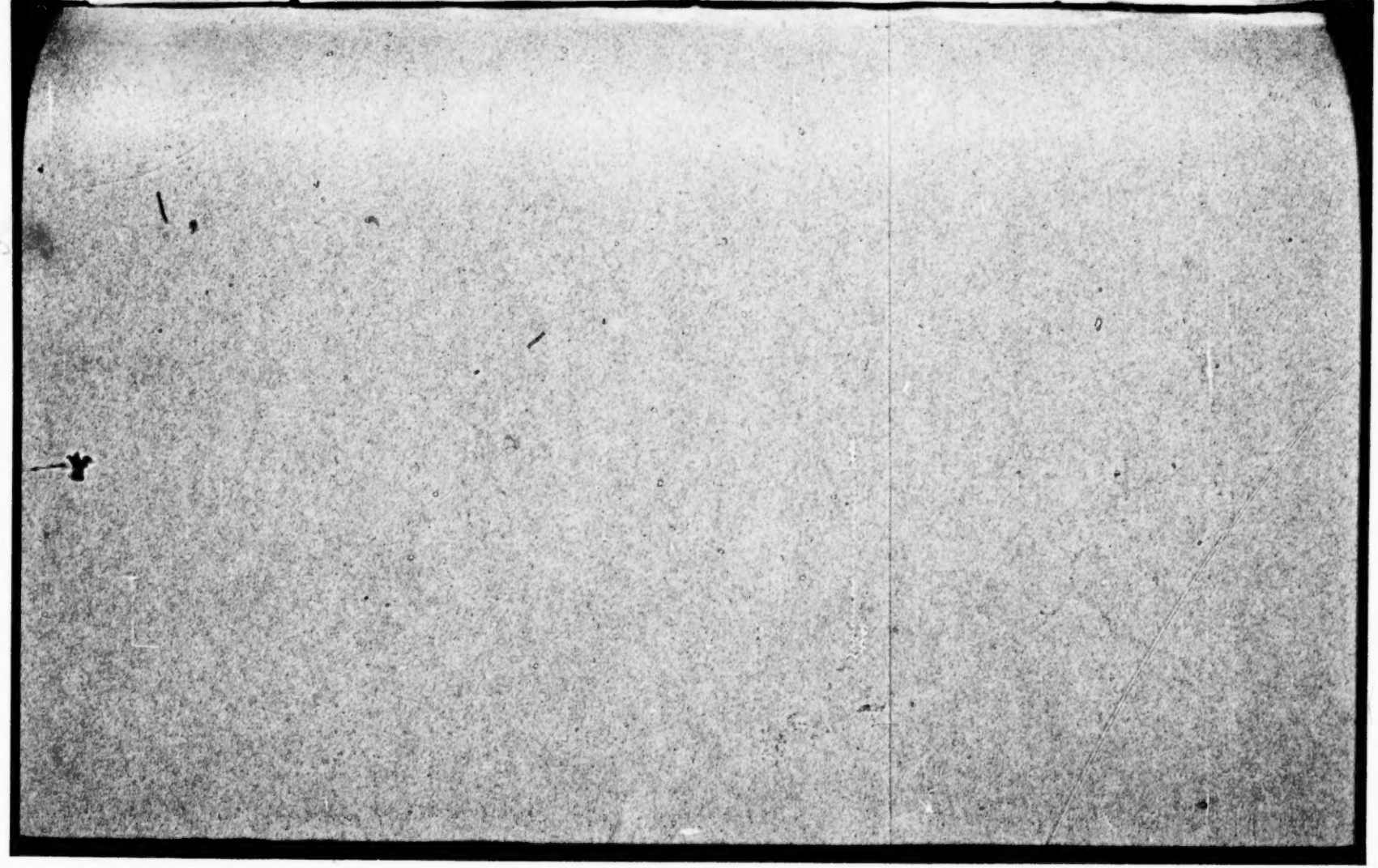

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1930

---

## No. 416

## THE UNITED STATES, PETITIONER

vs.

## WYMAN, PARTRIDGE & COMPANY

---

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Supreme Court of the United States

October term, 1930

No. 416

THE UNITED STATES, PETITIONER

v.

WYMAN, PARTRIDGE & COMPANY, A CORPORATION

*Petition for a writ of certiorari to the United States Court of Claims*

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the Court of Claims in the above case, rendered June 2, 1930, and not yet reported.

STATUTES INVOLVED

Section 1106 (a) of the revenue act of 1926 (c. 27, 44 Stat. 9, 113) provides:

2 "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Sections 607, 611, and 612 of the revenue act of 1928 (c. 852, 45 Stat. 791, 874, 875) provide:

"SEC. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

3 "SEC. 612. Section 1106 (a) of the revenue act of 1926 is repealed as of February 26, 1926."

STATEMENT

Respondent's income and profits tax return for the fiscal year ended November 30, 1918, was filed June 14, 1919, and the Federal tax liability reported thereon was assessed and paid during that year. (Finding 1.) On February 12, 1924, respondent and the Commissioner of Internal Revenue executed a written consent or "waiver" extending the statutory period for determination, assessment, and collection of taxes for the fiscal year in question "for one year from the date it is signed by the taxpayer." (Finding 1.)

In May, 1924, the Commissioner of Internal Revenue assessed an additional tax of $49,511.29 against respondent for the taxable period. (Finding 1.) This assessment was made within the period of limitations. On July 11, 1924, respondent filed a claim in abatement of this entire additional tax. (Finding 2.) On January 24,

4 1925, respondent and the Commissioner of Internal Revenue executed a second written consent or "waiver" further extending the statutory period for assessment of taxes for the fiscal year until December 31, 1925. (Finding 2.)

The statutory period for the collection of the taxes in question, as extended by the waivers, expired on December 31, 1925. On February 26, 1926, the revenue act of 1926 was approved.

The Commissioner of Internal Revenue by letter dated April 21, 1926, advised the respondent that its claim for abatement would be allowed to the extent of $3,518.42 and rejected for the balance, amounting to $45,992.87. (Finding 3.) On August 17, 1926, the respondent paid under protest the unabated portion of the additional tax. Interest was also paid in the amount of $545.56 on August 17, 1926, and $5,236.97 on March 5, 1927. (Finding 4.)

On July 18, 1927, the respondent filed a claim for refund of the amount so paid, upon the ground that it had been illegally collected after the expiration of the statute of limitations. This claim for refund was rejected by the Commissioner of Internal Revenue on April 4, 1928. (Finding 5.) On June 7, 1928, the

5 respondent instituted this suit in the Court of Claims to recover the additional tax so paid, with interest.

The petitioner's defense to this action was predicated upon the proposition that the provisions of section 611 of the revenue act of 1928 (p. —, supra), enacted prior to the institution of the respondent's suit, effectively barred a recovery of the amount in controversy. The respondent contended and the court held that section 611 could not be applied for the reason that the amount in suit was paid subsequent to the enactment of section 1106 (a) of the revenue act of 1926 (p. —, supra), and at a time when by reason of the provisions of section 1106 (a) respondent's liability for such additional taxes had been extinguished, and for the further reason that a denial of recovery by reason of the provisions of section 611 and of section 612 of the revenue act of 1928 (pp. ——, supra), would deprive the

respondent of a " vested right " in violation of the due-process clause of the fifth amendment.

The Court of Claims gave judgment for the respondent for $45,197.74, with interest.

6 QUESTIONS PRESENTED

1. Whether sections 607, 611, and 612 of the revenue act of 1928 should be construed to prevent the maintenance of this action against the United States.

2. Whether these sections, if so construed, are constitutional.

ASSIGNMENT OF ERRORS

1. The court erred in ruling that section 1106 (a) of the revenue act of 1926 was not retroactively repealed by section 612 of the revenue act of 1928, thereby in effect holding section 612 of the revenue act of 1928 unconstitutional.

2. The court erred in construing the provisions of section 1106 (a) to have created a " vested right " in respondent as against the United States.

3. The court erred in ruling that the provisions of sections 607 and 611 of the revenue act of 1928 did not preclude a refund or recovery of the amount in suit.

4. The court erred in refusing to recognize the power of Congress to specify the conditions under which a recovery may be had from the United States of moneys paid to or collected by it as taxes.

7 5. The court erred in giving judgment for the respondent.

REASONS FOR GRANTING THE WRIT

1. The construction and application of section 611 of the revenue act of 1928 is already before this court in four cases in which certiorari has been granted on petitions of taxpayers which the Government did not oppose—Graham v. Goodcell, No. 36, October term, 1930; Magee v. United States, No. 65, October term, 1930; Oak Worsted Mills v. United States, No. 104, October term, 1930; Taft Woolen Co. v. United States, No. 105, October term, 1930. The facts in the instant case are similar to those in the above-mentioned cases, except that in the instant case the tax was paid after the enactment of section 1106 (a) of the revenue act of 1926, while in the other cases the tax was paid before the enactment of that section.

2. Petitions for writs of certiorari are to be filed within a short time in three cases involving the same or similar points. These cases are Heiner v. Erie Coal & Coke Co., decided against the Government July 9, 1930, by the Circuit Court of Appeals for the Third Circuit, and Roy & Titcomb v. United States, decided April

8 7, 1930, and Mascot Oil Co. v. United States, decided June 2, 1930, both decided by the Court of Claims in favor of the Government upon other points.

3. The court below decided an important question of constitutional law in holding that section 1106 (a) of the revenue act of 1926 created "vested rights" which could not be impaired by subsequent legislation. The court in substance held unconstitutional section 612 of the revenue act of 1928, which in plain language repealed section 1106 (a) as of the date it was enacted. A final decision of this question of constitutional law is of great importance in securing the orderly administration of the taxing statutes. The question is presented in the cases of many taxpayers now pending, involving substantial sums of money. The precise question has been passed upon by the Circuit Court of Appeals for the Third Circuit in Heiner v. Erie Coal & Coke Co., supra, and by the Supreme Court of Pennsylvania in Wettengel v. Robinson, decided May 14, 1930. These decisions are in accord with that of the court below. But the decision of the court below is inconsistent with the reasoning of the opinion of the Circuit Court of Appeals for the Second Circuit in Reeves v. Anderson, decided July 21, 1930, and not yet reported, and with the reasoning of the Circuit Court of Appeals for the Ninth Circuit in Huntley v. Gile (32 F. (2d) 857), in both of which, however, the tax was paid before the enactment of the revenue act of 1926.

9 In United States v. John Barth Co. (279 U. S. 370, 376, this court found it unnecessary to pass on the question now presented. And in Home Insurance Co. v. Dick (281 U. S. 397, 409) this court said:

"Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine. Compare Davis v. Mills (194 U. S. 451) and Texas Portland Cement Co. v. McCord (233 U. S. 157) with Canadian Pac. Ry. Co. v. Johnston (61 Fed. 738)."

That issue is now raised in the instant case.

4. The decision of the court below that Congress could not by sections 611 and 612 of the revenue act of 1928 revive a tax liability which had been barred by statute is, we submit, inconsistent with the decisions of this court in Rafferty v. Smith, Bell & Co. (257 U. S. 226), United States v. Heinzsen & Co. (206 U. S. 370), and Campbell v. Holt (115 U. S. 620).

5. The court below misapplied the principle laid down in Wm. Danzer Co. v. Gulf R. R. (268 U. S. 633), for, as stated in the concurring opinion in the instant case, that case was a suit between private parties involving only the rights of private persons. The distinction between that and the instant case is obvious and the application wholly different when, as here, a public law is involved. (See Newton v. Commissioners, 100 U. S. 548, 559.)

10 6. Respondent's right to recover the taxes in controversy is purely statutory. Its suit was instituted subsequent to the enactment of the revenue act of 1928, and even if respondent had been entitled to a recovery prior to the enactment of this act by

reason of a favorable construction of section 1106 (a) of the preceding revenue act, nevertheless the enactment of sections 607, 611, and 612 of the revenue act of 1928 was a proper withdrawal by the United States of its consent to be sued and a prohibition against the entry of judgment herein. The decision of the court below that this suit could be maintained notwithstanding the action of Congress in withdrawing the consent of the United States to be sued is in conflict with the decision in Collector v. Hubbard (12 Wall. 1, 14). There this court said:

"Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer can not have any vested right in the remedy granted by Congress for the correction of an error in taxation."

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
*Solicitor General.*

SEPTEMBER, 1930.

11 In the United States Court of Claims

No. J–352

WYMAN, PARTRIDGE & COMPANY, A CORPORATION

vs.

THE UNITED STATES OF AMERICA

I. *Petition*

Filed June 7, 1928

*To the Court of Claims of the United States and to the Honorable the Judges Thereof:*

The above-named claimant by this, its petition, respectfully shows:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of Minnesota, engaged in the wholesale dry-goods business and having its principal place of business at Minneapolis, Minnesota.

2. Claimant duly prepared and executed an income-tax return for the fiscal year ended November 30, 1918, in accordance with the law then in effect and filed said return with the collector of internal revenue at St. Paul, Minnesota, on June 15, 1919. The said return was not a false or fraudulent return within the meaning of the statutes, which provide for the suspension of the running of the

statute of limitations with respect to such false or fraudulent returns.

3. Claimant on various dates paid to the said collector of
12 internal revenue at St. Paul, Minnesota, the full amount of tax shown by its return for the fiscal year ended November 30, 1918, to be due.

4. The five-year period provided by law for the assessment and collection of taxes from claimant for the fiscal year ended November 30, 1918, expired on June 15, 1924.

5. Prior to February 15, 1924, an agreement in writing was entered into between claimant and the Commissioner of Internal Revenue extending to February 12, 1925, the period within which the said commissioner might assess and collect taxes for the fiscal year ended November 30, 1918.

6. On January 24, 1925, the claimant and the Commissioner of Internal Revenue entered into a further agreement extending for one year the period within which the said commissioner might assess taxes for the fiscal year ended November 30, 1918. The said agreement of January 24, 1925, did not contain any extension with respect to the period within which the commissioner could collect taxes for the fiscal year ended November 30, 1918.

7. In May, 1924, the Commissioner of Internal Revenue assessed an additional tax against claimant for the fiscal year ended November 30, 1918, in the amount of $45,197.74.

8. In 1926 the collector of internal revenue forwarded to claimant a notice and demand, as in such cases provided for, which said notice and demand in effect informed claimant that unless said additional assessment of $45,197.74 for the fiscal year ended November 30, 1918, was paid to the said collector within a stipulated time, certain penalties would be incurred by claimant.

9. On August 6, 1926, the claimant under threat by the collector of internal revenue to impose the penalties provided for in the
13 said notice and demand, and in the belief that such penalties would be imposed by the said collector unless payment was made, did pay to the collector the said sum of $45,197.74 representing the additional taxes for the fiscal year ended November 30, 1918. The said payment was not made voluntarily by claimant but only as a result of the threat of the collector to impose the penalties provided for in the said notice and demand unless such payment was made.

10. The said collection of the $45,197.74 was illegal and void for the reason that it was made after the statutory period for collection had expired and under the threat of the collector to impose penalties which the taxpayer believed would have been imposed unless payment was made.

11. Upon information and belief the claimant avers that the total sum of $45,197.74 so paid by it to the said collector of internal revenue at St. Paul, Minnesota, was thereafter by him turned over and deposited in the Treasury of the United States of America in the usual course of his official business.

12. In July, 1927, to wit, July 14, 1927, pursuant to the provisions of law in such cases provided, claimant duly filed with the collector of internal revenue at St. Paul, Minnesota, a claim for refund of the $45,197.74 for the fiscal year ended November 30, 1918. The Commissioner of Internal Revenue has rejected the said claim for refund.

13. The whole of said sum of $45,197.74 is now wrongfully and unlawfully retained and withheld from the claimant without its consent and against its will by the United States of America.

14. No action other than as aforesaid has been had on this claim in Congress or by any department. The claimant has at all times borne true allegiance to the Government of the United States.
14 It has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. It is, and always has been, the sole and absolute owner of the claim here presented. It has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It is justly entitled to the amount claimed from the United States of America after allowing all just credits and set-offs.

15. The claimant believes the facts as hereinabove stated to be true.

Wherefore claimant prays judgment against the United States of America upon the facts and law for $45,197.74, together with interest and its reasonable costs and disbursements herein.

WYMAN, PARTRIDGE & COMPANY,
*Claimant.*

By GEO. H. PARTRIDGE.

FRANK J. ALBUS,
*Attorney for Claimant,*
*1166 National Press Bldg., Washington, D. C.*

[*Duly sworn to by Geo. H. Partridge: jurat omitted in printing.*]

15 II. *General traverse*

Filed July 17, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
*Assistant Attorney General.*

III. *Argument and submission*

On April 9, 1930, this case was argued and submitted on merits by Mr. Frank J. Albus, for the plaintiff, and by Mr. Charles R. Pollard, for the defendant.

16 IV. *Special findings of fact, conclusion of law, opinion of the court by Green, J., and concurring opinion by Littleton, J.*

Filed June 2, 1930

Mr. Frank J. Albus for plaintiff.

Mr. Charles R. Pollard, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant. Mr. J. H. Pigg was on the brief.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of the parties, makes the following

*Special findings of fact*

1. Plaintiff is a corporation, and on June 14, 1919, duly filed its corporation income and profits tax return for the fiscal year ended November 30, 1918, showing a tax liability of $363,641.97, which tax was paid during the same year. On February 12, 1924, the plaintiff and the Commissioner of Internal Revenue executed a waiver extending the statutory period for determination, assessment, and collection of taxes for the fiscal year ended November 30, 1918, "for one year from the date it is signed by the taxpayer." In May, 1924, the commissioner assessed against plaintiff an additional tax of $49,511.29 for the fiscal year ended November 30, 1918.

2. In order to avoid immediate payment of the additional tax assessed, and for the purpose of obtaining further consideration by the commissioner of the matter of its tax liability for the fiscal year in question, the plaintiff, on June 11, 1924, filed a claim in abatement of the said tax of $49,511.29 on several grounds. On January 24, 1925, the plaintiff and the commissioner executed a second waiver further extending the statutory period for assessment of taxes for the fiscal year in question until December 31, 1925.

3. By a letter dated April 21, 1926, the commissioner advised plaintiff that its claim in abatement would be allowed to the extent of $3,518.42, and rejected in the amount of $45,992.87. The said letter also advised plaintiff of its right to file a petition with the United States Board of Tax Appeals for a redetermination of the proposed action by the commissioner, but the plaintiff elected not to file such a petition with that board.

17 4. On August 17, 1926, the plaintiff, under protest, paid the unabated portion of the additional tax, $44,652.74 thereof being paid in cash, and the balance of $1,340.13 by the credit of an overpayment for a later year. Interest was also paid in the amount of $545.56 on August 17, 1926, and $5,236.97 on March 5, 1927.

5. On July 18, 1927, the plaintiff filed its claim for refund for the fiscal year ended November 30, 1918, in the amount of $45,197.74, "or such other amount as is legally refundable," on the ground that the same had been illegally collected after the statute of limitations had expired. This claim for refund was rejected by the commissioner on April 4, 1928.

*Conclusion of law*

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $45,197.74, with interest as provided by law.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of forty-five thousand one hundred ninety-seven dollars and seventy-four cents ($45,197.74), with interest at the rate of six per cent per annum from August 17, 1926, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

*Opinion*

GREEN, Judge, delivered the opinion of the court:

Additional income and excess-profits taxes were assessed against the plaintiff for the fiscal year of 1918 and collected together with interest thereon after the period of limitations had expired. Plaintiff now brings this suit to recover the amount so paid.

The plaintiff relies on section 1106 (a) of the revenue act of 1926, the provisions of which will hereinafter be set out. The defendant cites the cases of Oak Worsted Mills v. United States (68 C. Cls. 539) and Gotham Can Co. v. United States (68 C. Cls. 749) as authorities in its favor and claims that under the rules laid down therein it is entitled to judgment. Counsel for plaintiff insists that the decisions in these cases are erroneous. We do not agree with either of these contentions for reasons that follow.

The instant case is similar to the two cases cited above in some respects. There was an additional tax assessed within the period of limitations as fixed by the second waiver, a plea in abatement filed by the taxpayer, proceedings were stayed until the plea in abatement could be considered, and upon consideration the tax was in part abated and in part confirmed after the statute of limitations had run. Thereafter demand was made for the payment of the unabated portion, which the plaintiff paid under protest with interest thereon, and shortly after filed a claim for refund of the amount so paid.

There is, however, an important difference in the facts in the instant case which renders it necessary for us to review the
18 decisions in the Oak Worsted Mills case, supra, and the Gotham Can case, supra, and see whether or not they are in fact controlling. The payment of the tax in controversy was made August 17, 1926, after the passage of the 1926 revenue act and while it was still in force. This presents a different situation than that shown by the facts in the Oak Worsted Mills case and the Gotham Can case, for in both the tax was collected prior to the passage of the revenue act of 1926. In Mascot Oil Co. v. United States, No. K-67, decided February 17, 1930, a case in which the taxes were col-

lected after the expiration of the period of limitations and after the passage of the 1926 act, we called attention to the fact that the Gotham Can case was not controlling, but did not pass on the effect of section 1106 (a) of the 1926 act by reason of other facts in the case which we deemed did not make such a decision necessary. The opinion in the Mascot Oil Co. case, supra, has been withdrawn and a new opinion this day rendered upon the amended findings in order that a matter not discussed in the original opinion might be given attention, but the second opinion uses the same language with reference to the point above referred to and the judgment is the same as before.

In the Oak Worsted Mills case the question of the effect of section 1106 (a) of the act of 1926 was not presented in argument or discussed in the opinion. It is true that it was contended therein that the plaintiff had a vested right in the money which it sought to have refunded, but it was argued that this right accrued by reason of the limitation placed upon the time within which it could be collected, and we held that no vested right accrued to the taxpayer by reason of the running of the period of limitations for the collection of a valid tax. The chief contention made by counsel for plaintiff in the instant case is that plaintiff has obtained a vested right, but the claim now is that this right was obtained through section 1106 (a), to which reference has been made above.

In the Gotham Can decision we had occasion to discuss the application of section 1106 (a) to the facts in that particular case, which, however, as we have before noted, were different from those of the case at bar. In the opinion in the Gotham Can case we quoted from section 1106 (a) of the act of 1926 the following:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability: * * *."

It is contended now, as it was in the case last cited, that this provision created a vested right in plaintiff of which it could not be deprived without due process of law and without just compensation. In the Gotham Can case we called attention to the fact that this provision was separated only by a semicolon from a qualifying clause reading as follows:

"but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

This, we said, was a qualifying clause which must be construed together and in connection with the clause first quoted and we further stated—

"By the first clause it was intended to extinguish the liability and prevent collection of any tax barred by the statute of limitations, but under the second clause of the section it was made clear
19 that if the tax had been collected after the limitation period but prior to the passage of the revenue act of 1926, only the amount collected in excess of the correct tax for the year could be

recovered. If it is not so construed, the words of the second clause are obviously of no use whatever in any case."

And we further pointed out that it was our duty in construing the act to give these words some meaning if it could consistently be done. While some other language is used in the opinion, which standing by itself might be considered to have general application, it was intended that it should apply only to the particular facts in that case, and we think it is apparent that the chief point involved in the case at bar was not involved in the Gotham Can case. This will become more evident when we consider the difference which is made when we apply the statute to the facts in the instant case as distinguished from those in the two cases cited.

In the Oak Worsted Mills case and the Gotham Can case, the tax, being collected before the enactment of section 1106 (a) of the act of 1926, was still a liability of the taxpayer although the statute of limitations had run against the remedy provided for its collection. The payment of the tax having been made upon this liability and before it was extinguished, the taxpayer had not "overpaid the tax" and in such cases section 1106 (a) provided that "no credit or refund * * * shall be allowed." But in the instant case, by force of the same statute, the liability had been entirely extinguished when the payment was collected. Necessarily "the taxpayer has (had) overpaid the tax" for there was no tax owing at the time and no liability existed when the money was collected. The collector or commissioner, therefore, took money which was not owing to the United States and for that reason could not belong to it after it had been received. After it had been paid it was still the rightful property of the taxpayer. It is plain, therefore, that the question of whether a vested right had been acquired is quite different from what it was in the Gotham Can case, nor does it depend upon the statute of limitations as it did in the Oak Worsted Mills case. The statute, when applied to the facts in the instant case, did not merely put a limitation on the collection of the tax but it completely extinguished the liability, and this was done before the tax was collected. Under such circumstances we think the plaintiff obtained a vested right which could not be taken away by the subsequent repeal of section 1106 (a) as of the day upon which it was enacted.

Although the decisions in the Oak Worsted Mills case and the Gotham Can case are only applicable to cases where the taxes were collected after the expiration of the period of limitations but before the enactment of section 1106 (a) of the 1926 act, it has become necessary to review them at length. Unless our construction of section 1106 (a), as applied to cases where the taxes were paid after the enactment of this statute fits logically and harmoniously with the construction we have heretofore given it, obviously it can not stand.

Keeping this in mind, some further considerations supporting the rules laid down in the cases cited and in the case at bar can be added to support the statutory construction which has been given to section

1106 (a), and we find there is an important matter which seems hitherto to have been overlooked. While the existence of con-
20 ditions precedent are necessary in order that section 1106 (a) may become applicable and these conditions are stated therein, section 1106 (a) is not by its terms retroactive and, in the very nature of the subject matter to which it is applicable, it can not be. Where prior to the passage of the 1926 act the payment had been made of a tax which was a liability although the remedy had been barred the money so paid became the property of the United States; the transaction was closed; there remained neither debtor nor creditor. In such cases the liability for the tax was extinguished before the enactment of section 1106 (a) by the collection thereof. Manifestly, the provision of section 1106 (a) with reference to extinguishing the liability of the taxpayer did not and could not apply to cases in which no liability existed by reason of the whole matter being settled and closed. Section 1106 (a) therefore does not change the situation of th taxpayer as to taxes collected before its enactment. Congress, of course, might have given the taxpayer the right to recover any taxes which he had paid after the period of limitations had expired for the collection of the tax, for Congress can create a claim against the United States where none exists under the law as it stands; but in order to do this a very different provision from section 1106 (a) would have been required directly authorizing the person paying the tax, or from whom the tax had been collected, to sue the Government and recover back the amount paid. But this was not done, and we think it is quite manifest that Congress not only did not make the statute retroactive but had no intention of so doing.

It has been suggested that the construction which we have given to section 1106 (a) deprives this section of any force whatever, because the taxpayer could always recover any overpayment, providing, of course, that he duly filed a claim for refund. The statement that we have made above shows the error of such a conclusion, for we apply section 1106 (a) to cases that arose after it was enacted. In the Gotham Can case the tax was collected before the passage of section 1106 (a) and we applied the second clause of that section as preventing suits to recover taxes collected before its enactment. This situation distinguishes the Gotham Can case from the case at bar.

While some have criticized the language of this section as not being clear, we think its meaning and purpose are plain. It was intended as a statute of repose. It had no application to what had been done prior to its enactment, but it warned the public officials that after it was enacted the exaction of a payment upon a tax as to which the statute of limitations had run was taking money from the taxpayer without any liability on its part existing, or, in short, a collection made where there was no debt. This construction appears to us to be a reasonable one from every point of view. There was no intention of making the statute retroactive and thus upsetting what had already been done, but it was intended that further collection of taxes

after the period of limitations had run should stop. This would prevent further litigation and come nearer doing abstract justice than any other line of procedure that could have been provided.

Section 1106 (a) of the 1926 act was repealed as of the date of its enactment by the 1928 revenue act, but the rights of the plaintiff having become vested they were not affected by this repeal.

21 See William Danzer Co. v. Gulf R. R. (268 U. S. 633, 637), and the contention of the plaintiff on this point must be sustained.

One other question remains to be decided. Section 607 of the revenue act of 1928 provided that a tax paid after the expiration of the period of limitations should be considered an overpayment, and section 611 of the same act qualified section 607 by providing that where a tax was assessed within the period of limitations, a plea in abatement filed and collection stayed, the payment of the tax before or within one year after the act went into force "shall not be considered as an overpayment under the provisions of section 607."

As before stated, we held in the Oak Worsted Mills case and the Gotham Can case that where the tax had been assessed within the period provided by the statute, a plea in abatement filed and the collection of the tax stayed, section 611 applied and there could be no recovery of the tax paid unless it was an actual overpayment. But these decisions applied only to cases where the tax had been collected prior to the enactment of the 1926 statute. In a case like the one at bar, where the rights of the plaintiff had vested before the enactment of the 1928 act, the enactment of section 611 of that act had no more effect on plaintiff's rights than the repeal of section 1106 (a) of the 1926 act.

In accordance with these conclusions judgment will be entered in favor of the plaintiff for the amount prayed in its petition, to wit, $45,197.74, with interest at the rate of six per cent per annum from August 17, 1926, until paid. It is so ordered.

WILLIAMS, Judge, and BOOTH, Chief Justice, concur.

*Concurring opinion*

LITTLETON, Judge, concurring: I concur in the result reached in the majority opinion, and I agree that section 1106 (a) of the revenue act of 1926 is not retroactive.

The officials of the Treasury Department collected the amount which plaintiff seeks to recover, as a tax imposed by the revenue act of 1918 for the fiscal year ended November 30, 1918, and as interest.

The defendant now insists that the retroactive repeal of section 1106 (a) of the revenue act of 1926 by section 612 of the revenue act of 1928 and the enactment of section 611 of the latter act revived the tax originally imposed by the 1918 act. It is not controverted that the amount collected, other than the interest, which was assessed in May, 1920, was then due as a tax imposed by the revenue act of 1918.

The plaintiff insists that section 611 of the revenue act of 1928 can not bar the recovery of the amount paid for the reason that this section is unconstitutional and void, in that it deprives it of a vested right which could not be taken away by subsequent legislation of Congress. The assessment in May, 1924, was a jeopardy assessment made without compliance with the provisions of law entitling the taxpayer to a hearing. This entitled plaintiff to file a claim for abatement, which was done, and no bond was required by the collector. The statutory period of limitation within which a tax for the fiscal year 1918 could be collected from plaintiff expired under the statute and the consents entered into between the plaintiff and the commissioner on December 31, 1925, at which time the tax had not been collected, and the Commissioner of Internal Revenue
22 had made no decision of the claim for abatement. The commissioner rendered his decision on April 21, 1926. Collection was not made until August 17, 1926.

By the provisions of section 1106 (a) of the 1926 act, which became effective February 26, 1926, the plaintiff's liability for the tax was extinguished, and there was, therefore, no authority in law after December 31, 1925, for the collection of any amount from the plaintiff as a tax for the fiscal year ended November 30, 1918. The evident purpose of the retroactive repeal of 1106 (a) of the 1926 act and the enactment of sections 607 and 611 of the 1928 act was to restore the system for the assessment and collection of taxes to what it was on February 26, 1926, when section 1106 (a) of the revenue act of 1926 extinguished the liability for any tax which was barred and had not been collected prior to that date and for a tax which should thereafter become barred, and provided for the refund only of the excess over the correct tax liability in respect of a tax which had been collected after the statutory period of limitation bar before the passage of that act, with the added provision contained in section 611 (act of 1928) which was retroactive, authorizing the retention by the Government of a tax collected after the expiration of the statutory period of limitation for collection, if the amount so collected was assessed prior to June 2, 1924, and within the period of limitation provided by law, if the collection was stayed beyond the period of limitation by the filing of a claim in abatement.

I am of opinion, however, that none of the provisions of the revenue act of 1928 accomplished the result of reviving the liability in respect of a tax which became barred between February 26, 1926, and May 28, 1928, even if it be assumed that Congress had constitutional authority under its broad powers to lay and collect taxes, retroactively to recreate a liability for a tax which had been imposed by prior revenue acts and which tax became barred between these dates and the liability for which had been extinguished by section 1106 (a) of the 1926 act. Taxes are not imposed by implication and we may not hold that a liability for a tax once imposed, but extinguished, is revived or reimposed by a retroactive repeal of the statute which extinguished the liability. Prior to the enactment of section 12 of the Revised Statutes, now section 28, U. S. Code, Title 1, the

repeal of an act which repealed a former act operated to revive such former act. (United States v. Philbrick, 120 U. S. 54.) And, while the provisions of section 1106 (a) extinguishing the liability for a tax barred by the statute of limitation was not an act expressly repealing the revenue act of 1918, in effect a tax imposed by the act of 1918 and barred by the statute of limitation was abrogated and annulled by the new and substantive provision of this section as completely as if express words repealing the imposition of such tax had been used, and no language can be found in any of the provisions of the revenue act of 1928 reimposing the tax or recreating the liability therefor which had been extinguished by section 1106 (a) of the 1926 act. Section 612 of the revenue act of 1928 retroactively repealing section 1106 (a) of the 1926 act can not be construed as reviving the liability for the tax imposed by the revenue act of 1918. Nor can section 611 of the 1928 act be of any help to the defendant in this regard for it only authorizes the Government to retain the amount of any tax assessed and paid after the statute of limi-
23 tation, or assessed before and paid after the limitation period.

At the time the amount here in question was collected from the plaintiff there was no tax in existence which could have been stayed by the abatement claim. It seems to me, therefore, that the provisions of section 611 can only be applied to those cases where the tax was collected after the expiration of the statute of limitation but prior to the enactment of the revenue act of 1926, and the collection of tax as to which the statute of limitation expired before collection on a date subsequent to the enactment of the revenue act of 1928. So far as concerns the taxpayer's right to recover the amount of a tax collected after the expiration of the statute of limitation, the first clause of section 1106 (a) of the 1926 act extinguishing the liability gave the taxpayer no greater right than what he had before because, if he were compelled to pay a tax that was barred by limitation, he could recover it. (Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.) But, as substantive law, the provisions of section 1106 (a) extinguishing the liability had a different and greater effect upon the right of the Government to retain an amount collected while there was no liability for it as a result of the repeal of the statute which extinguished the liability of the taxpayer. (Dobbins v. Commissioner of Internal Revenue, 31 Fed. (2d) 935; Erie Coal & Coke Co. v. Heiner, 33 Fed. (2d) 135; A. T. Wettengel v. Robinson, et al., Trustees, decided by the Supreme Court of Pennsylvania May 12, 1930, Para. 1084, P. H. Fed. Tax Service, 1930, Vol. 1.)

I am of opinion, therefore, that plaintiff is entitled to recover because its liability for any amount was extinguished before the amount in question was collected, and such liability has not been revived.

I do not deem it necessary to pass upon the constitutionality of the provisions of the 1928 act. I am not prepared to agree that the extinguishment of a liability for a tax, which is a debt due the sovereign, creates such a vested or property right as was beyond

the control of Congress. The obligation to pay taxes rests not upon the privileges enjoyed or the protection given to a citizen but upon necessity of money for the support of the Government, but the citizen receives compensation therefore in privileges and protection. A tax is a demand of sovereignty. In Loan Association v. Topeka (20 Wall. 663) the court said:

"Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is, in its very nature, unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of Government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the Government. The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people."

There are many considerations which would enter into the question of the authority of Congress to recreate a liability to the Government for a tax that has been extinguished. A tax that is due is a debt due the sovereign and the ordinary statute of limitation relates only to the remedy and the repeal of the limitation provision,
24 even after the debt has become barred, does not deprive the citizen of his property without due process of law in violation of the fifth amendment. (Campbell v. Holt, 115 U. S. 620; Wm. Danzer & Co., Inc., v. Gulf & Ship Island R. R. Co., 268 U. S. 633.) Is the situation any different where a citizen is indebted to the Government for a valid tax, the liability for payment of which he is relieved, and shortly thereafter Congress decides to recreate the liability and remove the bar of the statute? The sovereign is not bound by the statute of limitation except by its consent, and in respect of taxes it would seem that, although the tax had become barred, Congress could have repealed the statute of limitation and thereby revived the right of the Government to collect. (Campbell v. Holt, supra.) May not Congress also, even though the liability for a tax as to which the statute has run has been extinguished, repeal the limitation statute and the statute extinguishing the liability for the tax and by appropriate legislation recreate the liability? It would seem that the only objection that could be raised to such action would be the power of Congress retroactively to recreate a liability for a tax that, beyond question, had once been lawfully imposed. (Cf. The City of Seattle v. Kelleher, 195 U. S. 351; United States v. Heinszen & Co., 206 U. S. 370; Billings v. United States, 232 U. S. 261; Rafferty v. Smith, Bell & Co., Ltd., 257 U. S. 226.) If Congress has authority retroactively to impose a tax and thereby create a debt for the tax to the sovereign in the first instance, has it not equal authority to reimpose and revive a tax that has been abrogated by a statute of limitation that relieved the taxpayer from liability? The case of Wm. Danzer & Co., Inc. v. Gulf & Ship Island R. R. Co., supra, was a suit for damages between private persons and the court held

that to construe section 206 (f) of the transportation act, suspending the statute of limitations during Federal control of railroads, retroactively, so as to create a liability that was barred at the time of its enactment, would be to deprive the railroad company of its property without due process of law in violation of the fifth amendment. That case is not necessarily authority for the proposition that the same rule would apply to the sovereign power of taxation.

25 V. *Judgment*

At a Court of Claims held in the city of Washington on the 2d day of June, A. D. 1930, judgment was ordered to be entered as follows:

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $45,197.74, with interest, as provided by law.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of forty-five thousand one hundred ninety-seven dollars and seventy-four cents ($45,197.74), with interest at the rate of six per cent per annum from August 17, 1926, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

26 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 35338. Court of Claims. Term No. 416. The United States, petitioner, vs. Wyman, Partridge & Company. Petition for a writ of certiorari and exhibit thereto. Filed September 2, 1930. File No. 35338.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES

*Order allowing certiorari*

Filed October 20, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Office Supreme Court, U. S.
DEC 1 1930
CHARLES ELMORE CROPLEY
Clerk

No. 416

# In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

*v.*

WYMAN, PARTRIDGE & COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 416

THE UNITED STATES, PETITIONER

*v.*

WYMAN, PARTRIDGE & COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims is reported in 41 F. (2d) 886.

### JURISDICTION

The judgment of the Court of Claims was rendered June 2, 1930. (R. 17.) Petition for certiorari was filed September 2, 1930. (R. 17.) Certiorari was granted October 20, 1930. (R. 19.) Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

### QUESTION PRESENTED

The broad general question involved in this and the other cases in this group is this: Where a tax is

assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

If this question should be answered in the affirmative, this additional question is presented in the instant case: Whether recovery of the tax should be allowed because of the fact that collection was made after the enactment of Section 1106 (a) of the Revenue Act of 1926 and before its retroactive repeal by Section 612 of the Revenue Act of 1928.

## STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 20–21.

## STATEMENT

On June 14, 1919, the respondent filed its income and excess profits tax return for the fiscal year ended November 30, 1918, and during the same year paid the tax thereon shown. (R. 8.) In May, 1924, and within the statutory period, the Commissioner assessed an additional tax. (R. 8.) On June 11, 1924, in order to avoid immediate payment and to obtain further consideration of the tax liability, a claim for abatement of the assessment was filed. (R. 8.) The collection of the additional assessment was deferred until August 17, 1926. The period

for collection as extended by waivers expired December 31, 1925. On February 26, 1926, Section 1106 (a) of the Revenue Act of 1926 was enacted (*infra,* p. 20). On April 21, 1926, the Commissioner decided the claim in abatement and abated a part of the assessment. The balance of the assessment, $45,992.87, was paid under protest on August 17, 1926, while Section 1106 (a) was in force. (R. 8.)

Claim for refund, on the ground that the collection was made after the expiration of the statutory period for collection, was filed July 18, 1927, and rejected April 4, 1928. (R. 8.) Suit was instituted in the Court of Claims on June 7, 1928, to recover the amount paid. (R. 5.)

The Government defended on the ground that Section 611 of the Revenue Act of 1928 barred recovery. The court rendered judgment for the taxpayer. (R. 17.)

## SPECIFICATION OF ERRORS

1. The court erred in ruling that Section 1106 (a) of the Revenue Act of 1926 was not retroactively repealed by Section 612 of the Revenue Act of 1928, thereby in effect holding Section 612 of the Revenue Act of 1928 unconstitutional.

2. The court erred in construing the provisions of Section 1106 (a) to have created a "vested right" in the respondent as against the United States.

3. The court erred in ruling that the provisions of Sections 607 and 611 of the Revenue Act of 1928

did not preclude a refund or recovery of the amount in suit.

4. The court erred in refusing to recognize the power of Congress to specify the conditions under which a recovery may be had from the United States of moneys paid to or collected by it as taxes.

5. The court erred in giving judgment for the respondent.

## SUMMARY OF ARGUMENT

Section 611 of the Revenue Act of 1928 should be construed to prevent recovery of taxes collected after the statutory time for collection had expired, if claim in abatement was filed and collection stayed. This was recognized by the Court of Claims in *Magee* v. *United States*, 37 F. (2d) 763 (now pending here on certiorari, No. 65, present term).

The only possible difference between that case and the instant case is that the tax was collected after the enactment of Section 1106 (a) in the instant case and before Section 1106 (a) in that case. But, we submit, this should not lead to a different result.

Whatever may be the proper construction of Section 1106 (a), the power of Congress to prescribe the conditions under which recovery of taxes from the United States may be had was not limited by that Section. Regardless of the construction of Section 1106 (a), its retroactive repeal was as proper an exercise of the right of Congress to con-

trol refunds of taxes as was the enactment of Section 611 of the Revenue Act of 1928. This was recognized by the Court of Claims and two Circuit Courts of Appeals to be a valid enactment. Therefore, Section 611 barred recovery in this case, whether Congress could retroactively repeal Section 1106 (a) or not, and recovery was barred by Section 611, apart from the repeal of Section 1106 (a).

## ARGUMENT

### I

**Section 611 of the Revenue Act of 1928 should be construed to prevent recovery of taxes collected after the the statutory time therefor had expired, if claim in abatement was filed and the collection stayed even until after the passage of the Revenue Act of 1926**

In the case of *Graham and Foster* v. *Goodcell,* now pending in this Court, No. 36, October Term, 1930, assigned for argument before this case, the brief for the respondent fully presents the question of the effect of Section 611 of the Revenue Act of 1928 (which is printed on pp. 20–21, *infra*). We there contend that Section 611 should be interpreted to prevent recovery of taxes paid out of time, if a claim in abatement was filed and the collection stayed.

The distinctions between that case and this are as follows: (1) In that case the suit was against the Collector; here it is against the United States. (2) In that case the claim in abatement was acted upon

before collection was barred; in this case the action on the claim in abatement was delayed until the period for collection had expired. (3) In that case the suit was instituted prior to the enactment of the Revenue Act of 1928 and during the life of Section 1106 (a) of the Revenue Act of 1926; in this case it was instituted after the repeal of Section 1106 (a) by the Act of 1928. (4) In that case the tax was collected before the enactment of Section 1106 (a) of the Revenue Act of 1926; in this case the tax was collected after the enactment of Section 1106 (a) and before its repeal.

The first three of these distinctions are all present in *Magee* v. *United States,* No. 65, October Term, 1930, and they are discussed in the Government's brief in that case. The present case will be controlled by the decision in the *Magee case,* unless the payment of the tax after the enactment of Section 1106 (a) of the Revenue Act of 1926 (p. 20, *infra*) and before its repeal, is a controlling distinction.

The language of Section 611 furnishes no indication that it was not intended to apply to collections made while the 1926 Act was in force. The fact that Section 612 (*infra,* p. 21) expressly repeals Section 1106 (a) of the 1926 Act as of the date of its enactment shows that collections made while the latter act was effective are not to be treated differently from any other late collections. The majority opinion of the court below did not construe Section 611 otherwise than as we contend, but a concurring opinion did.

The reasoning of the concurring opinion as to construction is, we submit, erroneous. The view there expressed was that although it was not beyond the power of Congress to prevent recovery in cases such as this, and although the power of Congress to impose the tax and change the statute of limitations was broad enough to warrant a recreation of the liability which had become extinguished, Congress in fact had not revived that liability. It states that by Section 1106 (a) (p. 20, *infra*) Congress extinguished the liability for the 1918 tax and that at the time of its collection, which was after the statutory period, as extended by waivers, had run, there was no authority of law to collect. Upon the principle that a repeal of a repealing Act does not revive the repealed Act, the opinion concludes that the liability to pay the tax was not revived by Section 612 of the Revenue Act of 1928. But Section 1106 (a) is not a repealing Act. It did not enact any new statute of limitations and did not purport to repeal any statute of limitations. At best it merely declared the effect of the existing statutes of limitations. Instead of repealing those limitations it operated upon them. If Section 1106 (a) had repealed the statute of limitations, it could not operate, because no new statute of limitations was created. The premise upon which the concurring opinion is founded is unsound. The reasoning of the opinion otherwise supports the position of the petitioner here as to the constitutionality of Sections 611 and 612.

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## II

**Section 611 of the Revenue Act of 1928 as so construed is constitutional when applied to a tax collected while section 1106 (a) of the Revenue Act of 1926 was in effect**

The power of Congress over matters of taxation is discussed on pp. 10–37, of our brief in *Graham* v. *Goodcell* (No. 36, present term). We submit that Section 611 of the Act of 1928 was a proper exercise of that power. It merely deprived taxpayers of their existing rights to recover taxes collected after the statutory period for collection had expired. We contend that Section 1106 (a) really gave taxpayers no substantial rights which they had not possessed before its passage. If so, it is obvious that the court below erred in holding that it conferred "vested rights" which could not be affected by subsequent legislation. The construction and effect of Section 1106 (a) we discuss under point A, *infra,* pp. 8–14.

We also submit that even if that section can be construed as conferring new and substantial rights on taxpayers, it was within the power of Congress later to deprive the taxpayers of those rights. See point B, pp. 15–18, *infra.*

### A. SECTION 1106 (a) OF THE REVENUE ACT OF 1926 GAVE THE TAXPAYER NO "VESTED RIGHTS"

Section 1106 (a) of the Revenue Act of 1926, provided:

> The bar of the statute of limitations against the United States in respect of any

> internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Because the tax involved in the present case was paid while this section was in force the court below held that "the rights of the plaintiff had vested before the enactment of the 1928 act" (R. 13), and that consequently the provisions of the 1928 Act could not constitutionally be applied to prevent recovery in this case. We maintain that the Court of Claims misconstrued Section 1106 (a). In order to appreciate the purpose and effect of this section it is necessary to understand the situation which gave rise to its enactment.

The apparent cause for the enactment of this section was the confusion resulting from a decision by the Court of Claims. On December 7, 1925, that court decided *Toxaway Mills* v. *United States,* 61 C. Cls. 363. There it was held, in substance, that where a tax was collected after the period for collection had expired, the taxpayer could not recover for that reason alone, but must show further that the tax computed with-

out regard to the statute of limitations had in fact been overpaid. This decision was later reversed by this Court on confession of error by the Solicitor General, 273 U. S. 781. After the opinion in the Court of Claims and before its reversal by this Court, the Revenue Bill of 1926 was under consideration by Congress. The Bill in its original form was amended by inserting Section 1106 (a).

The amendment was first proposed in the Senate and was as follows:

> SEC. 1106 (a). The bar of the statute of limitations against the United States and against the taxpayer in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability.

The purpose of the amendment was explained upon the floor of the Senate by Senator Reed, the member of the Finance Committee in charge of the bill, as follows (Congressional Record, 69th Congress, 1st Session, Vol. 67, Part 4, p. 3531):

> Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the collector may nevertheless issue his distraint and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, can not plead the statute of limitations, although the United States would have

> been barred from a suit for the tax because the statute had run. It is a preposterous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now.

This amendment was adopted by the Senate. But when the Senate Bill was referred to the Conference Committee the Section was changed to its final form. The report of the Conference Committee (House Report No. 356, 69th Congress, 1st Session, p. 55) contained the following statement:

> *Amendment No. 170.*—This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft, C. J., in *Graham* v. *Dupont*, 262 U. S. 234, 256, 268.) The House recedes with an amendment making certain that the provision does not require a refund to a taxpayer for any year (even though the statute has run against the Government) unless he had in fact overpaid his tax for that year,

> nor require a taxpayer to pay an additional tax for any year (even though the statute has run against his claims or suit for refund) unless he had in fact underpaid his tax for that year. Obviously, this section does not apply in the case of fraud or in the case of a waiver.

The obvious intent of Congress in enacting Section 1106 (a) was to insure to the taxpayer a right of recovery if the tax was collected out of time. It is equally apparent from this legislative history that the proper construction to be placed upon the qualifying clause of Section 1106 (a) added by the House Conferees is that it was intended to be a safeguard, deemed necessary to prevent the Government from being prejudiced in situations which might arise out of circumstances like these:

The period of the statute of limitations against additional assessments was five years from the due date of the return, and the period against the filing of claims for refund was four years from the payment of the tax; but the refund might be made at any time thereafter if the claim was filed in time. It frequently might happen that a taxpayer could show that he had erroneously included an item as income and that the portion of the total tax assessed and paid on that item should be refunded. Although his claim had been filed in time, the determination that the refund was allowable might occur long after the period for assessment of additional taxes. In making the adjustment sought by the taxpayer, which might not take place until after the

period for assessment had expired, it might appear that some other, and perhaps larger, item had been erroneously omitted from the determined taxable income. But the five years for assessment of a tax on that item had run. The refund was allowable but an additional assessment and collection were barred. The qualifying clause in Section 1106 (a) would make certain that in such a case refund was not to be made unless after making the counteradjustments of the taxable income it would appear that the taxpayer had, in fact, overpaid the tax by the payment which had already been made.

This construction is consistent with the Conference Report, *supra*, pp. 11–12, and gives effect to each word in the section. It is likewise consistent with the decisions of this Court in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, and in the *Toxaway Mills case*, *supra*.

The court below construed Section 1106 (a) to deny a recovery founded on a collection out of time in cases where the collection was made before the passage of Section 1106 (a), unless the amount collected was in excess of the correct tax. (R. 10.) This, we submit, can not be correct, because of the decision of this Court in the *New York & Albany Lighterage case* and *Toxaway Mills case*. The effect of those cases was that where a tax is collected out of time, refund should be made for that reason alone. The conclusion of the court below is founded on an erroneous conception of the effect of the running of the statute of limitations. The

Court of Claims apparently has adhered to the views expressed in its original opinion in the *Toxaway Mills case*. From this it deduced that the effect of Section 1106 (a) was to create in the taxpayer for the first time a right to recover taxes solely because they were collected out of time, but only taxes paid after its enactment.

In cases of collection before the enactment of Section 1106 (a), the taxpayer under the applicable jurisdictional acts (Section 145 of the Judicial Code and Section 3220 of the Revised Statutes) had a right of action founded on the illegality of the collection. In cases of collection during the life of Section 1106 (a) there was the same right to recovery for the same reason. But the taxpayer was not dependent upon the extinguishment of the liability as a basis of his cause of action. The fact that the tax was illegally collected was sufficient. In such cases Section 3220 of the Revised Statutes authorized the Commissioner to refund. Upon rejection of a timely application therefor by the Commissioner, the taxpayer could invoke Section 145 of the Judicial Code and bring the action. The question then before the court would be: Has the Commissioner of Internal Revenue failed to give the taxpayer the relief which Congress has authorized?

Consequently, we maintain that Section 1106 (a) gave taxpayers no substantial new rights, but that it merely affirmed a right which they already had.

B. SECTION 1106 (A) OF THE REVENUE ACT OF 1926 WAS EFFECTIVELY REPEALED AS OF THE DATE OF ITS ENACTMENT BY SECTION 612 OF THE REVENUE ACT OF 1928 AND ANY RIGHTS ACCRUING THEREUNDER CAN NOT NOW BE ENFORCED

Section 1106 (a) of the Revenue Act of 1928 has been repealed retroactively as of the date of its enactment by Section 612 of the Revenue Act of 1928 (*infra*, p. 21).

Although the power of Congress to affect rights between individuals is limited by the Fifth Amendment, there is no such limit regarding claims against the sovereign. As was stated in the concurring opinion in the court below (R. 16):

> A tax that is due is a debt due the sovereign and the ordinary statute of limitation relates only to the remedy and the repeal of the limitation provision, even after the debt has become barred, does not deprive the citizen of his property without due process of law in violation of the fifth amendment. (*Campbell* v. *Holt*, 115 U. S. 620; *Wm. Danzer & Co., Inc.*, v. *Gulf & Ship Island R. R. Co.*, 268 U. S. 633.) Is the situation any different where a citizen is indebted to the Government for a valid tax, the liability for payment of which he is relieved, and shortly thereafter Congress decides to recreate the liability and remove the bar of the statute? The sovereign is not bound by the statute of limitation except by its consent, and in respect of taxes it would seem that, although the tax had become

barred, Congress could have repealed the statute of limitations and thereby revived the right of the Government to collect. (*Campbell* v. *Holt, supra.*) May not Congress also, even though the liability for a tax as to which the statute has run has been extinguished, repeal the limitation statute and the statute extinguishing the liability for the tax and by appropriate legislation recreate the liability? It would seem that the only objection that could be raised to such action would be the power of Congress retroactively to recreate a liability for a tax that, beyond question, had once been lawfully imposed. (Cf. *The City of Seattle* v. *Kelleher*, 195 U. S. 351; *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Billings* v. *United States*, 232 U. S. 261; *Rafferty* v. *Smith, Bell & Co., Ltd.*, 257 U. S. 226.) If Congress has authority retroactively to impose a tax and thereby create a debt for the tax to the sovereign in the first instance, has it not equal authority to reimpose and revive a tax that has been abrogated by a statute of limitation that relieved the taxpayer from liability? The case of *Wm. Danzer & Co., Inc.* v. *Gulf & Ship Island R. R. Co., supra*, was a suit for damages between private persons and the court held that to construe section 206 (f) of the transportation act, suspending the statute of limitations during Federal control of railroads, retroactively, so as to create a liability that was barred at the time of its enact-

> ment, would be to deprive the railroad company of its property without due process of law in violation of the fifth amendment. That case is not necessarily authority for the proposition that the same rule would apply to the sovereign power of taxation.

The right of action recognized by Section 1706 (a) was one allowed by the sovereign against itself. No such right is protected by the Constitution. The right, being given by Congress, is subject to modification or defeat by Congress. No right of action against the sovereign can be vested as against the power of the United States to change the basis of the claimed right. So long as the money has not been refunded to the respondent, the control of the Government over it is complete. *United States* v. *Heinszen & Co.*, 206 U. S. 370. This follows from the immunity of the sovereign from suit. In *Beers* v. *Arkansas*, 20 How. 527, 529, Chief Justice Taney said:

> * * * as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

In the instant case the respondent had no vested right in the continuation of the law regarding the limitations against collection nor in Section 1106 (a) as to the effect of the running of the statute of

limitations. Its rights were subject to control by Congress. There is, therefore, no constitutional prohibition against the retroactive repeal of Section 1106 (a). The tax having been collected, the only right that the respondent had by reason of Section 1106 (a) was to assert a claim for moneys collected after the period of limitation for collection. This was a right of action against the United States which was enforcible only at the will of Congress. Until that right had been prosecuted to a conclusion and the money repaid, it was wholly subject to the action of Congress. The effect of Sections 607, 611, and 612 of the Revenue Act of 1928 is to ratify the collection of taxes out of time in the class specified, just as the effect of the Act of June 30, 1906, was to ratify the collection of the duties involved in *United States* v. *Heinszen Co.*, 206 U. S. 370.

We submit that Section 612 of the Revenue Act of 1928 effectively repeals Section 1106 (a) as it purports to do, and that this retroactive repeal is constitutional. With Section 1106 (a) repealed as of the date of its enactment, this case is identical in principle with the *Magee case*. We submit that the conclusion of the Court of Claims in that case, that Section 611 barred recovery by the taxpayer, is correct and should control this case.

## CONCLUSION

The judgment of the Court of Claims should be reversed and the case remanded with instructions to dismiss the petition.

Respectfully submitted.

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NOVEMBER, 1930.

## APPENDIX

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides:

> The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App. Title 26, Sec. 1249.)

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provides in part as follows:

> SEC. 607. *Effect of expiration of period of limitation against United States.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)

SEC. 611. *Collections stayed by claim in abatement.*—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C. Sup. III, Title 26, Sec. 2611.)

SEC. 612. *Repeal of Section 1106 (a) of 1926 Act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C. Sup. III, Title 26, Sec. 2612.)

U. S. GOVERNMENT PRINTING OFFICE: 1930

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 416.

THE UNITED STATES, PETITIONER,

*vs.*

WYMAN, PARTRIDGE & COMPANY, A CORPORATION.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.**

## Brief for the Respondent in Opposition.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.**

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## Brief for the Respondent in Opposition.

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### OPINION BELOW.

The opinion of the Court of Claims (R. 9) has not been officially reported.

### JURISDICTION.

The judgment sought to be reviewed was entered June 2, 1930. (R. 17.) The petition for writ of certiorari was filed September 2, 1930. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

## QUESTION PRESENTED.

Whether Sections 607, 611 and 612 of the Revenue Act of 1928 prevent the respondent from recovering against the United States.

## STATUTES INVOLVED.

Section 1106(a) of the revenue act of 1926 (c. 27, 44 Stat. 9, 113), provides:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Sections 607, 611 and 612 of the revenue act of 1928 (c. 852, 45 Stat. 791, 874, 875) provide:

> "SEC. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
>
> "SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to pay-

ments made after the expiration of the period of limitation on assessment and collection.

"SEC. 612. Section 1106(a) of the revenue act of 1926 is repealed as of February 26, 1926."

## STATEMENT.

The statement of the case set forth by the petitioner (R. 2) covers the pertinent facts involved in the case and no further statement is made by the respondent.

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## ARGUMENT.

The petitioner has advanced several reasons to show why its petition for certiorari should be granted. Reference is made by the petitioner to the cases of Graham *vs.* Goodcell, No. 36, October Term, 1930; Magee *vs.* United States, No. 65, October Term, 1930; Oak Worsted Mills *vs.* United States, No. 104, October Term, 1930, and Taft Woolen Company *vs.* United States, No. 105, October Term, 1930, all of which involve the construction and application of Section 611 of the Revenue Act of 1928. The statement is then made by the petitioner that these cases differ from the instant case only in the fact that in the cases cited the collection of the sum in controversy was made prior to the enactment of Section 1106(a) of the Revenue Act of 1926, whereas in the instant case collection was made after the enactment of this section of the law. The application for the writ would seem to indicate that this difference is of minor importance, whereas it is the one controlling fact which removes the case of this respondent from the principle announced in the cases cited by the petitioner. The most positive proof of this statement is the fact that of the four cases cited by the petitioner in Reason No. 1, three of them were decided by the Court of Claims, the very court that rendered judgment in favor of this respondent. Furthermore,

the judgment of the Court of Claims in the case of the respondent was rendered after that Court had reached its conclusion in the three cases referred to above which conclusively shows the lower court determined that the question involved in the instant case is materially different from the question involved in the cases cited by the petitioner. Consequently, the fact that Section 611 of the Revenue Act of 1928 is now before this Honorable Court on a question materially different from that found in the case of the respondent is not a reason under the rules and decisions of this court for the granting of a writ of certiorari in the instant case.

The second reason advanced by the petitioner for the granting of the writ is unsound. The statement is made that an application for a writ of certiorari will be filed in the case of Heiner *vs.* Erie Coal and Coke Company, decided against the Government July 9, 1930, by the Circuit Court of Appeals for the Third Circuit which involves the same point. The respondent admits that the principle in the Erie Coal & Coke Company case is similiar to the principle in its case, however, the Circuit Court of Appeals for the Third Circuit reached the same conclusion as did the Court of Claims in the case of the respondent and instead of being a reason for the allowance of the writ it is an argument for its disallowance. Furthermore, the cases referred to by the respondent that *may* come before this Honorable Court on points not involved in the case of this respondent should not be cited in support of a reason for the granting of a writ of certiorari in the instant case.

The third reason advanced by the petitioner for the granting of the writ is that "the court in substance neld unconstitutional Section 612 of the Revenue Act of 1928." It will be noted the petitioner stated that the Court "in substance" held Section 612 of the Revenue Act of 1928 unconstitutional. No reference was made to any portion of the decision of the Court of Claims to show wherein the Court decided the issue on a question of constitutional

law. A reference to the opinion of the Court of Claims (R. 12) will show that in speaking of Section 1106(a) of the Revenue Act of 1926, the Court said:

> "It had no application to what had been done prior to its enactment, but it warned the public officials that after it was enacted the exaction of a payment upon a tax as to which the statute of limitations had run was taking money from the taxpayer without any liability on its part existing, or, in short, a collection made where there was no debt. This construction appears to us to be a reasonable one from every point of view. There was no intention of making the statute retroactive and thus upsetting what had already been done, but it was intended that further collection of taxes after the period of limitations had run should stop. This would prevent further litigation and come nearer doing abstract justice than any other line of procedure that could have been provided.
>
> "Section 1106(a) of the 1926 act was repealed as of the date of its enactment by the 1928 revenue act, but the rights of the plaintiff having become vested they were not affected by this repeal."

It will be noted the Court said that the rights of the plaintiff were not "affected" by the repeal of Section 1106 of the Revenue Act of 1926. They did not say that the rights of the plaintiff were not "destroyed" by the repeal of Section 1106(a). This Honorable Court in a quite recent decision in the case of Russell et al. *vs.* United States, 278 U. S. 181, had occasion to construe the word "affect" as used in Section 278(e) of the Revenue Act of 1924 which provided that that section shall not "affect any assessment made, or distraint proceeding in Court begun before the enactment of this act." This Honorable Court construed the word "affect" in the above section to mean that it deprived Section 278 of any possible *application* to cases where assessment had been made prior to June 2, 1924. Under a similar construction of the decision of the Court of Claims it would seem that this Court concluded as a matter of

statutory construction that Section 612 of the Revenue Act of 1928 had no *application* to the case of the respondent.

Likewise, in speaking of the application of Section 611 of the Revenue Act of 1928 to the case of the respondent the Court of Claims said:

> "In a case like the one at bar, where the rights of the plaintiff had vested before the enactment of the 1928 act, the enactment of section 611 of that act had no more effect on plaintiff's rights than the repeal of Section 1106(a) of the 1926 act."

Again it would seem that the Court held that Section 611 of the Revenue Act of 1928 did not *apply* to the case of this respondent. And in a concurring opinion Judge Littleton said:

> "I do not deem it necessary to pass upon the constitutionality of the provisions of the 1928 act."

If there is any doubt about a question of this kind it should be presumed that the conclusion of the Court of Claims was reached through the application of principles of statutory construction rather than a declaration of unconstitutionality since it is a fundamental principle of law that where there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid the Courts will adopt the construction which will uphold it. Presser *vs.* State of Illinois, 116 U. S. 252; 6 S. Ct. 580.

The petitioner claims that the decision of the Court of Claims in the instant case is inconsistent with the decisions of this Honorable Court in the cases of Rafferty *vs.* Smith, Bell & Company, 257, U. S. 226; United States *vs.* Heinszen & Company, 206 U. S. 370; Campbell *vs.* Holt, 115 U. S. 620. This statement by the petitioner is an additional reason for the contention of the respondent that the decision of the Court of Claims was based upon principles of statutory construction as applied to Section

607, 611 and 612 of the Revenue Act of 1928, since the Court of Claims appears to be in full accord with the decisions cited by the petitioner. As already stated in the application filed by the petitioner there is now pending before this Honorable Court the cases of Magee *vs.* United States, Oak Worsted Mills *vs.* United States, and Taft Woolen Company *vs.* United States; all decided by the Court of Claims. The Court of Claims based its decision in the Magee and Taft Woolen Company cases on its opinion in the Oak Worsted Mills case. In the Oak Worsted Mills case the Court of Claims cited with approval the three Supreme Court cases referred to by the petitioner. The conclusion must, therefore, be reached that the Court of Claims in the case of this respondent did not feel that the principles in the cases cited had any application.

The petitioner contends that by the enactment of Sections 607, 611 and 612 of the Revenue Act of 1928, the United States withdrew its consent to be sued and prohibited the entry of judgment in the case of the respondent. The sections of the law referred to are set out in full at pages 2-3 of this brief. The petitioner failed to point out how the sections of the law referred to can be construed as a withdrawal by the United States of its consent to be sued. The word "Court" does not appear in Sections 607, 611 or 612 and there is no statement in any of these sections to the effect that the right of the petitioner to sue has been curtailed. The jurisdiction of the Court of Claims to entertain the suit of the respondent was established by the so-called Tucker Act, passed in 1883, which became Section 145 of the Judicial Code and which now appears as Section 250 of Title 28 of the Code of Laws of the United States of America. The question of the jurisdiction of the Court of Claims in cases of this type is no longer in controversy. Dooley *vs.* United States, 182 U. S. 222; United States *vs.* Emery, Bird, Thayer Realty Company, 237 U. S. 28. The respondent acquired its right to bring the suit under Section 3226 of the Revised Statutes as amended. Whenever

Congress intended to change or modify the provisions of Section 3226 of the revised statutes it specifically referred to that section and set forth the particulars in which it was amended. See Revenue Act of 1921, Chap. 136, Sec. 1318, 42 Stat. 315; Revenue Act of 1924, Chap. 234, Sec. 1014, 43 Stat. 343; Revenue Act of 1926, Chap. 27, Sec. 1113, 44 Stat. 9. Certainly if Congress by any provision of the Revenue Act of 1928 intended to amend Section 3226 specific reference would have been made to this section in the Revenue Act of 1928. Sections 3220, 3228, and 3176 of the revised statutes were amended by the Revenue Act of 1928. See Section 619 of the Revenue Act of 1928. It will be noted that specific reference is made to these sections of the revised statutes and amendments enacted in connection therewith. Certainly if Congress intended to amend Section 3226 it would have appeared as an amendment in Section 619 of the Revenue Act of 1928.

As far as the respondent can find no case in which the facts are similar to those in its case has been decided in favor of the Government. In fact, there does not appear to have been a dissenting opinion in any case.

Decisions have been rendered against the Government on facts similar to those in the case of this respondent in the following cases:

Pepsin Syrup Company *vs.* Schwaner, 35 Fed. (2d) 197, decided by the District Court for the Southern District of Illinois;

Clinton Iron & Steel Company *vs.* Heiner, 30 Fed. (2d) 542, decided by the District Court for the Western District of Pennsylvania;

Erie Coal & Coke Company *vs.* Heiner, 33 Fed. (2d) 135, decided by the District Court for the Western District of Pennsylvania;

Diamond Alkali Company *vs.* Collector, Par. 9150, C. C. H. Tax Service, 1930, decided by the District Court for the Western district of Pennsylvania, February 10, 1930;

Heiner *vs.* Erie Coal & Coke Company, decided by the Circuit Court of Appeals for the Third Circuit under date of July 9, 1930, affirming the District's Court's decision;

Wettengel *vs.* Robinson, decided by the Supreme Court of Pennsylvania, under date of May 14, 1930;

Southern Lumber Company *vs.* United States, decided by the District Court for the Western District of Arkansas, under date of May 6, 1930.

The case of Reeves *vs.* Anderson, decided July 21, 1930, by the Circuit Court of Appeals for the Second Circuit cited by the petitioner has no application to the case of the respondent for the reason that in that case collection was made prior to the passage of the Revenue Act of 1926, consequently, that case is similar to those now pending before this court.

It can be seen that there is no conflict in the authorities although the question has been presented to the Courts in various parts of the country. It would seem, therefore, that the law is well settled.

## CONCLUSION.

It is submitted that the petitioner has advanced no sufficient reason under the rules and decisions of this Honorable Court for the issuance of a writ of certiorari and the respondent prays that the said writ be denied. Magnum Import Company *vs.* Coty, 262 U. S. 159; Hamilton Shoe Company *vs.* Wolf, 240 U. S. 251; Starney et al. *vs.* United States, 37 Fed. (2d) 188.

Respectfully submitted,

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FILE COPY

U. S.
DEC 6 1930

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,

*vs.*

WYMAN PARTRIDGE & COMPANY.

## BRIEF FOR THE RESPONDENT.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,

*vs.*

WYMAN PARTRIDGE & COMPANY.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.**

## BRIEF FOR THE RESPONDENT.

### OPINION BELOW.

The opinion of the Court of Claims (Rec., p. 9) is reported in 41 F. (2d) 886.

### JURISDICTION.

The judgment of the Court of Claims was entered June 2, 1930, (Rec., p. 17). The petition for writ of certiorari was filed September 2, 1930, (Rec., p. 21). This Court granted certiorari on October 20, 1930, (Rec., p. 18) 282 U. S. —. Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

### QUESTIONS PRESENTED.

The questions presented are:

1. Whether Section 611 of the Revenue Act of 1928, (U. S. C. Supp. III, Title 26, Section 2611) should be construed as an administrative provision applying only to the

Commissioner of Internal Revenue and not applying to suits in the Courts.

2. Whether Section 611 of the Revenue Act of 1928 is to be construed so as to deprive the respondent of its title and right to possession and enjoyment of the money illegally collected from it as a tax after the statutory period for collection had expired and after Section 1106 (a), (U. S. C. App., Title 26, Section 1249) of the Revenue Act of 1926 had completely extinguished the liability.

3. Whether Section 611 of the Revenue Act of 1928 is constitutional under the Fifth Amendment of the Constitution of the United States if it be construed as an attempt to deprive the respondent of the rights which accrued to it under Section 1106 (a) of the Revenue Act of 1926.

4. Whether Section 611 of the Revenue Act of 1928 should be construed as a withdrawal by the Government of its consent to be sued.

5. Whether the attempted repeal of Section 1106 (a) of the Revenue Act of 1926 by Section 612 of the Revenue Act of 1928, (U. S. C. Supp. III, Title 26, Section 2611) as of the date of its enactment can prevent the respondent from recovering in this action.

6. Whether Section 611 of the Revenue Act of 1928 should be construed as a recreation of a tax liability which had been completely extinguished by Section 1106 of the Revenue Act of 1926, which provided in part, "that the bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability."

## STATUTES INVOLVED.

The statutes involved in this proceeding are as follows:

Section 1106 (a) of the Revenue Act of 1926, 44 Stat. 9, 113, provides:

> Sec. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar

the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statutes of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Section 607 of the Revenue Act of 1928, 45 Stat. 791, 874, provides:

> Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 611 of the Revenue Act of 1928, 45 Stat. 791, 875, provides:

> Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Section 612 of the Revenue Act of 1928, 45 Stat. 791, 875, provides:

> Sec. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT.—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

Section 1113 of the Revenue Act of 1926 provides as follows:

> Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall, within 90 days after any such disallowance, notify the taxpayer thereof by mail."
>
> (b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. App. Title 26, Sec. 156.)

Section 3226 of the Revised Statutes was not amended by the Revenue Act of 1928.

## STATEMENT OF FACTS.

The Statement of Facts in the brief of the petitioner (pages 2 and 3) is a fair statement of the case. Suffice it is to say, that the year involved is the fiscal year ended November 30, 1918. (Rec., p. 8); that in May, 1924, an additional

assessment of income and excess profits taxes was made against the respondent by the Commissioner of Internal Revenue (Rec., p. 8); that the respondent did thereupon file a claim in abatement without bond (Rec., p. 8); that the statutory period for collection as extended by waivers expired on December 31, 1925, (Rec., p. 8); that Section 1106 (a) of the Revenue Act of 1926 became law on February 26, 1926; that on August 17, 1926, the respondent, under protest, paid an amount of $45,992.87, being a portion of the additional assessment made in May, 1924, (Rec., p. 8); that on July 18, 1927, respondent filed its claim for refund on the grounds that collection was improperly made after the statutory period for collection had expired (Rec., p. 8); that the claim was rejected on April 4, 1928, (Rec., p. 8) and suit was instituted on June 7, 1928, (Rec., p. 6).

## SUMMARY OF ARGUMENT.

The respondent shall show that Section 611 of the Revenue Act of 1928 is merely a limitation upon Section 607 of the same act and that Section 607 was enacted to enlarge the power of the Commissioner of Internal Revenue in making refunds and credits of amounts collected as taxes after the statutory period for collection had expired, consequently, that section has no application to suits filed in the Courts for the recovery of amounts illegally collected. If this Court holds that Section 611 of the Revenue Act of 1928 applies to suits in the Courts, then the respondent shall show that by virtue of Section 1106 (a) of the Revenue Act of 1926 it acquired a vested property right which could not be affected by any subsequent legislation of Congress, and shall show further that Section 611 did not, and could not, recreate any tax liability that had been completely extinguished by Section 1106 (a) of the Revenue Act of 1926. The respondent shall show further that any attempt by Congress to recreate a liability which had been extinguished by Section 1106 (a) of the Revenue Act of 1926 is unconstitutional and void as a taking of property in violation of

the Fifth Amendment of the Constitution of the United States. The respondent shall also show that Section 611 of the Revenue Act of 1928 was not a withdrawal by the Government of its consent to be sued and that under the facts in this case if Section 611 is so construed then it would be repugnant to the Constitution.

---

## ARGUMENT.

### PRELIMINARY STATEMENT.

At the outset the respondent wishes to call the attention of this Court to a very important fact in this case which is not present in the case of Graham and Foster *vs.* Collector, now pending in this Court, No. 36, October Term, 1930. This important fact is that the collection of the amount in controversy was made from the respondent on August 17, 1926, while Section 1106 (a) of the Revenue Act of 1926 was in effect, which section provided that the bar of the statute of limitations against the United States shall not only bar the remedy but shall extinguish the liability. In the Graham and kindred cases pending before this Court collection was made prior to February 26, 1926, the date of the passage of the Revenue Act of 1926. The importance of this distinction can readily be seen when it is noted that the Court of Claims rendered judgment in favor of this respondent after that Court had already given judgment in favor of the Government in a number of cases where collection had been made prior to the passage of Section 1106 (a) of the Revenue Act of 1926. The respondent shall show that it is entitled to recover in this proceeding regardless of what the decision of this Court may be in the case of Graham and Foster *vs.* Collector.

## I.

## SECTIONS 607 AND 611 OF THE REVENUE ACT OF 1928 ARE ADMINISTRATIVE PROVISIONS APPLYING ONLY TO THE COMMISSIONER OF INTERNAL REVENUE AND DO NOT APPLY TO A CASE WHERE SUIT IS BROUGHT IN THE COURTS.

Section 1106 (a) of the Revenue Act of 1926 (C. 27, 44 Stat. 9, 113) provides in part as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax."

It will be noted that Section 1106 (a) prevents a "credit or refund" unless the taxpayer has overpaid the tax. Since the Commissioner of Internal Revenue is the only person authorized to make a "credit" or a "refund," it is quite apparent that the limitation against such credits or refunds in Section 1106 (a) had application to him alone. This conclusion is fully sustained by the final action taken in the case of Adelaide F. Chapman *vs.* United States, 63 Ct. Cls. 424, in which the Court of Claims construed Section 1106 (a) of the Revenue Act of 1926 as preventing the plaintiff in a suit from recovering barred taxes unless the taxpayer has actually overpaid the tax. Petition for certiorari was filed by the taxpayer and in a brief submitted on behalf of the United States, in which the Solicitor General agreed that the writ should issue, it was said:

> "After the decision in Bowers *vs.* New York and Albany Lighterage Company, supra, was handed down and it was disclosed that the Court of Claims was in error in holding that the claim of the United States had not been barred, and on March 31, 1927, the petitioner filed a motion for new trail, which was overruled October 24, 1927. Section 1106 (a) was

brought to the attention of the Court of Claims in connection with that motion, although the record does not disclose it, and the action of the Court of Claims in overruling the motion can only be explained on the theory that it held that Section 1106 (a) operated to prevent petitioner from obtaining a refund of the tax paid notwithstanding that when paid its collection was barred by the statute of limitations.

"The phrase 'but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax,' literally construed, may mean that where a tax has been paid which was barred by the statute of limitations when paid, refund shall nevertheless be denied unless the taxpayer has overpaid the tax in the sense of paying more than was justly due without regard to the statute of limitations.

"Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in Graham *vs.* Dupont, supra, or prevent distraint proceedings by injunction and may be compelled by the Collector to pay a tax, the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

The judgment of the Court of Claims was vacated and the case remanded to enter judgment for the taxpayer. October term, 1928, 49 S. Ct. p. 7; 278 U. S. 660. (See also Ellay Co. *vs.* Bowers, 25 F (2d), 637; certiorari denied 48 S. Ct. 601.)

The Commissioner of Internal Revenue also was of the opinion that Section 1106 (a) of the Revenue Act of 1926 merely limited his right to make refunds and credits of amounts collected after the statutory period for collection had expired and that it did not prevent recovery in the

courts. In I. T. 2382, C. B. VI-2-102, issued during the Fall of 1927, the Commissioner of Internal Revenue said:

> "Many inquiries are being received both from within and without the Bureau as to the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of Bowers *vs.* New York & Albany Lighterage Company. Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the New York & Albany Lighterage Company decision may have no application to cases where bonds were filed or where claims in abatement were filed, *and that, in view of Section 1106 of the Revenue Act of 1926, the decision should be limited to refunds resulting from court decisions and has no applications to refund by the Commissioner.* Furthermore, Section 1106 was not raised in the Albany Lighterage Company case and was not considered in connection with the confession of error made by the Government in the Toxaway Mills case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the Albany Lighterage Company decision to other cases in view of Section 1106.
>
> "In view of the great uncertainty as to the whole matter it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the Albany Lighterage Company decision unless and until the situation is clarified by further court decision or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

The above statement by the Commissioner of Internal Revenue was an invitation by the Commissioner to Congress to pass legislation to clarify his power in making refunds and credits in cases where sums had been collected after the statutory period for collection had expired. Congress anansweredthe invitation of the Commissioner of Internal

Revenue by enacting Sections 607 and 611 of the Revenue Act of 1928. By Section 607 Congress provided that any amount collected after the expiration of the period of limitation properly applicable thereto either before or after the passage of the Revenue Act of 1928 shall be considered an "overpayment" and shall be refunded to the taxpayer if claim therefor is properly filed. In other words, Section 607 merely removed the bar which Section 1106 (a) of the Revenue Act of 1926 had imposed upon the Commissioner and made it possible for him to make refunds and credits of amounts collected after the statutory period had expired, provided claim for refund was properly filed. This Section had no application to suits in Court since the Chapman case, supra, clearly shows that the authority of the Court to allow recovery had not been curtailed by Section 1106 (a) of the Revenue Act of 1926.

Section 611 of the Revenue Act of 1928 is merely a limitation on Section 607 and provides that in a case where an assessment was made prior to June 2, 1924, and if a claim in abatement was filed, and if the collection of any part of the tax was stayed, then the payment of such part was not to be considered an *overpayment under the provisions of Section 607*. But since Section 611 was merely a limitation upon Section 607 and as Section 607 had no reference to suits in Court it follows as a matter of course that Section 611 likewise had no reference to suits in Court. It was so held in Diamond Alkali Company *vs.* Heiner, 39 F. (2d) 643.

## II.

## UNDER THE PROVISIONS OF SECTION 1106 (a) OF THE REVENUE ACT OF 1926 WHICH PROVIDES THAT THE BAR OF THE STATUTE SHALL NOT ONLY BAR THE REMEDY BUT SHALL EXTINGUISH THE LIABILITY, THE RESPONDENT ACQUIRED A VESTED PROPERTY RIGHT.

Kent in his Commentaries, Vol. 4, page 202, defines a vested right as follows:

"A vested right is an immediate right of present

enjoyment, or a present, fixed right of future enjoyment."

In the case of Pearsall *vs.* Railway Company, 161 U. S. 646, this Court said:

> "Rights are said to be vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

In the case of Gladney *vs.* Syndor, 172 Mo. 318, the Court said:

> "Vested rights may be created either by the common law, *by statute*, or by contract, and it makes no difference as to the method of their creation, *they are entitled to the same protection.*" (Italics supplied.)

In Marshall *vs.* King, 24 Miss. 85, the Court defined a vested right "to be an immediate fixed right of present or future enjoyment."

Justice Chase in the case of Calder *vs.* Bull, 3 Dall. 386, 1 L. Ed. 648, when speaking of a vested right said:

> "When I say that a right is vested in a citizen, I mean that he has the power to do certain acts, or to possess certain things, according to the law of the land."

When we consider the above definitions there appears to be no doubt that when Section 1106 (a) of the Revenue Act of 1926 extinguished the liability of the respondent with respect to its tax liability for the fiscal year 1918, it acquired a vested right of present enjoyment in the realization that no further liability remained for that year and this realization was just as effectual as though the respondent had taken its money to the collector of Internal Revenue and removed the liability by a payment in cash. In the latter case the liability would have been removed by payment in cash while in the former case the liability was removed by operation of law. The result in either case would be exactly the same, namely, the extinguishment of the liability.

It seems fundamental that a taxpayer who paid his liability in cash thereby acquired a vested right not to be called upon again to satisfy the same liability. For the same reason the taxpayer whose liability was extinguished by operation of law acquired a vested right of present enjoyment in knowing that the liability that had been extinguished is forever gone.

Judge Green in the opinion below aptly set forth the effect of Section 1106 (a) of the Revenue Act of 1926 when he said:

> "The collector or commissioner, therefore, took money which was not owing to the United States and for that reason could not belong to it after it had been received. *After it had been paid it was still the rightful property of the taxpayer* . . .
>
> "It (Section 1106 (a) of the Revenue Act of 1926) had no application to what had been done prior to its enactment, but it warned the public officials that after it was enacted the exaction of a payment upon a tax as to which the statute of limitations had run was taking money from the taxpayer without any liability on its part existing, or, in short, a collection made where there was no debt." (Italics supplied.)

It is submitted, therefore, that by virtue of Section 1106 (a) of the Revenue Act of 1926 the respondent acquired a vested property right and that the collection of the amount involved in this action was a confiscation of property which rightfully belonged to the respondent. The respondent shall show that the vested right which it acquired by virtue of Section 1106 (a) of the Revenue Act of 1926 is fully protected under the Fifth Amendment of the Constitution of the United States and that this right could not be taken from it by any subsequent legislation.

## III.

## IF SECTION 611 OF THE REVENUE ACT OF 1928 BE CONSTRUED AS AN ATTEMPT TO DEPRIVE THE RESPONDENT OF ITS PROPERTY AND ITS VESTED RIGHT OF ACTION TO RECOVER, IT WOULD BE CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION.

If this Court determines that Congress intended by Section 611 of the Revenue Act of 1928 to deprive respondent of its property and also of its vested right of action of recovery, this Section would be violative of the Fifth Amendment, and void so far as respondent's case is concerned. The decisions of this Court sustain the respondent in this contention.

Mr. Justice Chase, in the case of Calder *vs.* Bull, supra, said:

> "There are acts which the Federal or State Legislatures can not do, without exceeding their authority, . . . as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I can not call it a law), contrary to the great first principles of the social compact, can not be considered a rightful exercise of legislative authority . . . or a law that takes property from A and gives it to B; it is against all reason and justice, for a people to intrust a Legislature with such powers; and therefore, it can not be presumed that they have done it."

To apply Section 611 to respondent's case, notwithstanding Section 715, the Separability Clause of the Revenue Act of 1928, would render that section unconstitutional.

Nichols *vs.* Coolidge, 274 U. S. 53; 52 A. L. R. 1081.

Blodgett *vs.* Holden, 275 U. S. 143.

Untermyer et al. *vs.* Anderson, Collector of Internal Revenue, 276 U. S. 440; 48 S. Ct. 353.

Justice demands that respondent be permitted to assert its legal and constitutional rights on reasonably equal terms with the petitioner before an impartial judicial tribunal.

Atchison, Topeka & Santa Fe Railway Company *vs.* O'Connor, 223 U. S. 280.

Christie-Street Commission Co. *vs.* United States, 136 Fed. 326, 69 C. C. A. 464.

Emery, Bird, Thayer Realty Co. *vs.* United States, 198 Fed. 242 (affirmed 237 U. S. 28).

Fidelity & Columbia Trust Co. *vs.* Lucas, 7 F. (2d), 146.

In the early case of Dartmouth College *vs.* Woodward, 4 Wheat, 518, this Court laid down the rule that where individuals have acquired absolute or vested rights under a statute a subsequent repeal can not divest these rights.

And in the case of Pritchard *vs.* Norton, 106 U. S. 132, this Court said:

> "A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law it is not competent for the legislature to take it away."

A similar conclusion was reached by the Court in United States *vs.* Henrich, 12 Fed. (2d) 940, viz.:

> "My conclusion here is that Congress can not enact a law that would destroy, impair or injuriously affect rights that have vested under a former constitutional enactment, and that to enforce the Act of June 4, 1920, against the defendant and require him again to pay for his property would be in violation of the constitutional guarantee heretofore cited." (Fifth Amendment of the Constitution of the United States.)

In the case of Crump *vs.* Guyer, 157 Pac. 321; 2 A. L. R. 331, the Court reaches the same legal conclusion, and then said:

> "To hold otherwise would leave us at sea and place it in the power of the legislature at will to

> disturb, and even destroy by subsequent legislation rights which had accrued under existing laws."

By what right does the United States retain this illegally collected sum, or what statute creates and imposes any new liability upon this respondent, or precludes it from recovering back the illegally collected sum of money, or what law or statute of Congress could deprive respondent of its property and authorize the United States to keep and retain its property in violation of the Fifth Amendment of the Constitution? Certainly Section 611 did not confer such right and authority in the petitioner.

This Court in the case of Wm. Danzer and Company, Inc. *vs.* Gulf & Ship Island Railway Company, 268 U. S. 633, had occasion to pass upon a question closely related to the one found in the case of this respondent. The facts in that case show that in 1920, Congress passed the Transportation Act which contained a provision to the effect that the period of Federal control over railroads was not be computed as a part of the two year period of limitation for bringing action against carriers or for filing claims for reparation with the Interstate Commerce Commission for causes of action arising prior to Federal control. A claim for damages had been filed with the Interstate Commerce Commission against the railroad in question and an award was made by the Commission. The claim was not filed within two years from the date of the cause of action, however, if the period during which the Federal Government had control over the railroad were excluded, then the claim was filed in time. This Court held that the expiration of the two year period of limitations for filing the claim against the railroad not only barred the remedy but extinguished the liability and that the attempt of Congress by the Transportation Act of 1920 to modify the statutory period to recreate the liability after it had been extinguished was to deprive the carrier of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It appears that the attempt of Congress in passing Section

611 of the Revenue Act of 1928, either to recreate a liability which had been completely extinguished by operation of law or to retain the property of the respondent illegally taken, is subject to the same objection.

## IV.

## THE CASES CITED BY THE PETITIONER TO SHOW THAT CONGRESS HAS POWER TO ALTER AND AMEND A STATUTE PERTAINING TO THE REMEDY HAVE NO APPLICATION TO THE CASE OF THE RESPONDENT.

On page 17 of the petitioner's brief reference is made to the case of Beers *vs.* Arkansas, 20 How. 527, to support its contention that Congress has power to deprive the respondent of the rights acquired under Section 1106 (a) of the Revenue Act of 1926. The petitioner also refers to its brief in the case of Graham and Foster *vs.* Goodcell, No. 36, October Term, 1930, now pending in this Court, in which it cites the cases of Collector *vs.* Hubbard, 12 Wall. 1, and Rock Island, A. and L. R. Company *vs.* United States, 254 U. S. 141, in support of the same principle. The respondent shall show that none of these cases have any application to the principle involved in its case.

The Beers' case arose under a statute of the State of Arkansas permitting the State to be sued on State bonds. Under this statute a suit was brought upon State bonds and while the suit was in litigation the legislature passed another law requiring the bonds to be filed in Court or the suit to be dismissed. The suitor refused to file his bonds in Court and the suit was dismissed. The Supreme Court of Arkansas sustained the dismissal of the suit and the case was then carried to this Court. The question for determination was whether or not the original law authorizing suit without the filing of the bonds in Court was a contract which was impaired by the subsequent act of the legislature. This Court held that the original law was not a contract and that the provisions of the subsequent act requiring the

filing of the bonds in Court before the suit could be continued violated no constitutional rights of the suitor. Certainly this case has nothing to do with the case of the respondent. In the first place the question of a vested right was not involved and in the second place the subsequent act of the legislature of the State of Arkansas merely referred to the *remedy*. It prescribed certain conditions that had to be complied with before the Court acquired jurisdiction. The record in the case of this respondent clearly shows that it has complied with all of the conditions requisite to the jurisdiction of the Court. After it was required to pay the amount in controversy it filed its appeal with the Commissioner of Internal Revenue for refund and upon rejection of its claim it filed this suit in the Court within the two year period provided by law. The petitioner has never contended that the respondent did not comply with these conditions.

In order to show that the decision of this Court in the Beers case was limited to the one question referred to above, the following quotation is made from the case:

> "Nor has the State Court, in the judgment brought here for review, decided anything but the question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought *nor the obligations it created or the rights of parties under it.* It has decided merely, that it had no right under the law of the State to try this question unless the bonds given by the State are filed." (Italics supplied.)

It is clear that the case of Beers *vs.* Arkansas has no application to the case of this respondent.

Nor do the cases of Collector *vs.* Hubbard, supra, and Rock Island R. Company *vs.* United States, supra, apply to the case of the respondent. The Hubbard case arose under the Act of June 30, 1864, 13 Stat. at Large, 281, which laid what is known as an income tax. Hubbard protested payment of the tax under the Act and on August 19, 1865, he paid the tax under compulsion. Hubbard then brought

suit to recover the amount illegally collected and under the law in effect at that time it was not necessary to first appeal to the Collector or the Commissioner of Internal Revenue before suit could be brought. While the suit of Hubbard was pending in the Circuit Court, Congress, on July 13, 1866, passed an act which provided that no suit shall be instituted in any Court unless an appeal is first made to the Commissioner of Internal Revenue for a return of the amount illegally collected. The suit was called for trial in June, 1867, and on the basis of the admitted fact that no appeal had been made to the Commissioner, the Circuit Court dismissed the case. Hubbard then on August 9, 1867, sued the collector in indebitatus assumpsit in the State Court of Connecticut without first having appealed to the Commissioner of Internal Revenue. Hubbard contended that no such appeal was necessary in his case for the reason that he had acquired a vested right to bring the suit without appealing to the Commissioner of Internal Revenue. This Court held that Hubbard could not bring the suit without having first appealed to the Commissioner in view of the Act of July 13, 1866.

In the Rock Island case the claimant had filed an abatement claim against certain proposed taxes. The Commissioner of Internal Revenue rejected the abatement claim and required payment of the tax. The claimant then brought suit on the rejected claim without appealing to the Commissioner of Internal Revenue after payment of the tax. This Court held that the claimant had not complied with the conditions of the *remedy* and could not maintain its suit because it had not appealed to the Commissioner of Internal Revenue for a refund after payment of the tax.

The above cases clearly apply only to a compliance of the conditions of the *remedy*. As already pointed out the record in this case clearly shows that the respondent has complied with all of the conditions of the remedy. If it had failed to file its claim for refund within the proper time or if it had failed to lodge its suit in the Court within two

years of the time of the rejection of the claim for refund, it would not be before this Court prosecuting this action. The petitioner has confused *rights* with *remedies* and has cited law in support of the latter to sustain the former. As was said by this Court in Chelentis *vs.* Luckenback S. S. Company, 247 U. S. 384:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury."

And in the case of Ettor *vs.* Tacoma, 228 U. S. at pp. 155, 156 and 158, this Court said:

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or *deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority.* Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So also a statute, under the form of taking away or changing a particular remedy, *may take away an existing property right*, or impair the obligation of a contract. . . . The right to compensation was a vested property right." (Italics supplied.)

See also the case of Smallwood *vs.* Gallardo, 275 U. S. 56; 48 S. Ct. 23.

While, therefore, Congress has power to legislate with respect to the remedy, it can not legislate to defeat a vested property right which is something separate and distinct from a remedy. And in the Ettor case, supra, this Court said that a statute obstensibly affecting the remedy could not be sustained "if it deprives one of a vested property right."

Chief Justice Marshall in the case of Marbury *vs.* Madison, 1 Cranch, 137, said:

> "To take away all remedy for the enforcement of a right is to take away the right itself. But this is not within the power of the State."

It is submitted, therefore, on the basis of the decisions of this Court, supra, any attempt on the part of Congress by Sections 611 or 612 of the Revenue Act of 1928 to deprive the respondent of the rights which accrued to it under Section 1106 of the Revenue Act of 1926 is unconstitutional and void for the reason that it violates the Fifth Amendment.

## V.

## SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT WITHDRAW THE CONSENT OF THE UNITED STATES TO BE SUED BY THE RESPONDENT.

The petitioner contends that by Section 611 of the Revenue Act of 1928 Congress withdrew the consent of the United States to be sued by the respondent. It is not clear to the respondent upon what basis the petitioner supports its contention. The word "Court" does not appear in Section 611 and there is no statement in that section to the effect that the right of the respondent to sue has been curtailed. The jurisdiction of the Court of Claims to entertain the suit of the respondent was established by the so-called Tucker Act, passed in 1883, which became Section 145 of the Judicial Code and which now appears as Section 250 of Title 28 of the Code of Laws of the United States of America. The question of the jurisdiction of the Court of Claims in cases of this type is no longer in controversy. Dooley *vs.* United States, 182 U. S. 222; United States *vs.* Emery, Bird, Thayer Realty Company, 237 U. S. 28. The respondent acquired its right to bring the suit in connection with Section 3226 of the Revised Statutes as amended. Whenever Congress intended to change or modify

the provisions of Section 3226 of the Revised Statutes it specifically referred to that section and set forth the particulars in which it was amended, See Revenue Act of 1921, Chap. 136, Sec. 1318, 42 Stat. 315; Revenue Act of 1924, Chap. 234, Sec. 1014, 43 Stat. 343; Revenue Act of 1926, Chap. 27, Sec. 1113, 44 Stat. 9.

Certainly if Congress by any provision of the Revenue Act of 1928 intended to amend Section 3226, specific reference would have been made to that section in the Revenue Act of 1928. Sections 3220, 3228, and 3176 of the revised statutes were amended by the Revenue Act of 1928. See Section 619 of that act. It will be noted that specific reference is made to these sections of the revised statutes and amendments enacted in connection therewith. If Congress intended to amend Section 3226 it would have appeared specifically as an amendment in the Revenue Act of 1928.

Any Government "of the people, by the people, for the people," will afford its citizens a proper judicial tribunal wherein to fairly litigate wrongs committed by that Government against its citizens, and when that consent has become a matter of settled law, certainly the courts will not by implication determine such consent to have been withdrawn. Section 611 of the Revenue Act of 1928 is not only devoid of any clear language to show a withdrawal of the consent of the United States to be sued but on the other hand it clearly indicates an intent merely to apply to the powers of the Commissioner of Internal Revenue.

The Circuit Court of Appeals for the Eighth Circuit in the case of Christie-Street Commission Company *vs.* United States, 136 Fed. 326, announced the prevailing rule when that Court, speaking through Judge Sanborn, said:

> "The Acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its contro-

> versies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the king can do no wrong. *There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it.* There is no reason why a Government should not submit its controversies with its subjects to adjudication or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs as universally as individuals. The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view." (Italics supplied.)

This doctrine was reaffirmed in Emery, Bird, Thayer Realty Company *vs.* United States, supra.

In Marbury *vs.* Madison, supra, Chief Justice Marshall said:

> "The Government of the United States has been emphatically termed a Government of laws and not of men. It will certainly cease to deserve this high appellation *if the laws furnish no remedy for the violation of a vested legal right.*" (Italics supplied.)

Courts of justice have no jurisdiction to make exceptions to a statute, nor to add to the exceptions which the legislature has made, as this would be legislating. Where the language of an act is explicit, it is not for the court to change it by construction based upon some supposed legislative policy. It is not for the court to say that it shall be so construed as to embrace other cases because no good reason can be assigned why they were excluded from its provisions. If the meaning of the legislature is plain, it must be obyed.

> Vol. 4, Ency. of U. S. S. Ct. Reps., p. 228.
>
> United States et al. *vs.* Missouri Pac. R. Co., 49 S. Ct. 133; 278 U. S. 269.

The rule was tersely stated in United States *vs.* Hartwell, 6 Wall., 385, 396 (18 L. Ed. 830):

> "If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

This is also the recognized rule of the English courts. In one of the English decisions Lord Denman said the court was bound to look to the language employed and construe it in its natural and obvious sense, even though that was to give the words of the act an effect probably never contemplated by those who obtained the act and very probably not intended by the Legislature which enacted it.

> The King *vs.* The Commissioners, 5 A. and E. 804, 816.
>
> See, also, United States *vs.* Lexington Mill Co., 232 U. S. 399, 34 S. Ct. 337, 58 L. Ed. 658, L. R. A. 1915B, 774.
>
> Caminetti *vs.* United States, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442; L. R. A. 1917F, 502 Ann. Cas. 1917B, 1168.

It is submitted that under the most liberal construction Section 611 of the Revenue Act of 1928 can not be construed to be a withdrawal by the Government of its consent to be sued.

Furthermore, the respondent contends that under the facts as found in this case, an act of Congress attempting to deprive the respondent from recovering its property would in itself offend the Constitution in that it would result in a taking of the property of the respondent without due process of law. Nor does this contention offend the general proposition that a Government can prescribe the conditions under which it may be sued. Congress has prescribed the conditions under which it may be sued in this case and as already stated the respondent has fully and completely complied with all of these conditions. The question then is: if the Government has given its consent to be sued and

certain vested rights have been acquired, the divesting of which would offend the Constitution, can Congress defeat the protection afforded by the Constitution by completely withdrawing all redress? If this question is answered in the affirmative then the supposed guarantees in our social compact become a hollow myth and the efforts of our eminent jurists who have developed our principles of constitutional law have been in vain.

In the case of Langford *vs.* United States, 101 U. S. 341, this Court said:

> "As applicable to the Government, or any of its officers, the maximum that the king can do no wrong has no place in our system of constitutional law."

And in the case of Brushaber *vs.* Union Paciffe R. Company, 240 U. S. at pp. 24-25, this Court, speaking through Chief Justice White, said:

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. (Citing authorities.)
>
> "And no change in the situation here would arise even if it be conceded, as we think it must be, *that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is a taking of the same in violation of the Fifth Amendment.*" (Italics supplied.)

Any statute of Congress which would attempt to permit the United States to retain property which rightfully belongs to the respondent on the sole basis that the respondent shall not have it, would, in the words of Chief Justice White be so

"arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is a taking of the same in violation of the Fifth Amendment."

Furthermore, in the case of Macallen Company *vs.* Commonwealth of Massachusetts, 279 U. S. 620; 49 S. Ct. 432, this Court said:

> "Constitutional provisions, either operating by way of grant or limitation are to be enforced according to their letter and spirit and can not be evaded by any legislation which seeks to accomplish indirectly that which can not be done directly."

It is submitted, therefore, that Section 611 of the Revenue Act of 1928 can not be construed as a withdrawal by the United States of its consent to be sued and furthermore, any such construction would cause the Section to offend the the Fifth Amendment of the Constitution.

## VI.

## SECTION 612 OF THE REVENUE ACT OF 1928 WHICH ATTEMPTS TO REPEAL SECTION 1106 (a) OF THE REVENUE ACT OF 1926 AS OF THE DATE OF ITS ENACTMENT HAS NO EFFECT ON THE RIGHT OF THE RESPONDENT TO RECOVER.

The petitioner at page 15 et seq. of its brief contends that any rights which accrued to the respondent under Section 1106 (a) of the Revenue Act of 1926 were divested by Section 612 of the Revenue Act of 1928, which attempts to repeal Section 1106 (a) as of the date of its enactment. The respondent will show that Section 611 had no such effect.

This Court, in the case of Memphis *vs.* United States, 97 U. S., p. 293, said:

> "We do not deny that it is competent for a legislature to repeal an act which when it was passed was a mere gratuity, *if while it was in existence no vested rights have been acquired under it or in virtue of it.*" (Italics supplied.)

In the case of County of McCracken *vs.* Mercantile Trust Company, 84 Ky. 314; 1 S. W. 585, the Court said:

> "A law can be repealed by the lawgiver but the rights which have been acquired while it was in force do not thereby cease. This was the rule of the civil law and has been strictly adhered to in England, where there is no express restriction upon legislative power."

This Court in the case of De Lima *vs.* Bidwell, 182 U. S., p. 199, speaking through Mr. Justice Brown said:

> "Plaintiffs sue in assumpsit for money which the collector has in his hands, justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action, would be beyond its power. In any event it should not be interpreted so as to make it retroactive."

To the same effect see the case of Lincoln *vs.* United States, 202 U. S., p. 485.

The above principle of law was also announced by Chief Justice Marshall in the case of Fletcher *vs.* Peck, 6 Cranch 133; 10 U. S. 75, when he said:

> "The principle asserted is that, one legislature is competent to repeal an act which a former legislature was competent to pass; and that one legislature can not abridge the powers of a succeeding legislature. The correctness of this principle so far as respects general legislation can never be controverted. *But if an act be done under a law, a succeeding legislature can not undo it. The past can not be recalled by the most obsolute power.*" (Italics supplied.)

And in the case of Frost *vs.* Corporation Commissioner, 278 U. S. 515; 49 S. Ct. 235, this Court, speaking through Mr. Justice Sutherland, referred to the case of Davis *vs.* Wallace, 257 U. S. 478, in which it was said:

> "An existing statute can not be recalled or restricted by anything short of a constitutional enactment."

The petitioner in its brief calls attention to the fact that the action in this case was not filed in the Court until after the Revenue Act of 1928 was passed. The record shows that the claim for refund was filed with the Commissioner of Internal Revenue prior to the passage of the Revenue Act of 1928. The petitioner in its brief advances no argument with respect to this question of fact. Nor could it, for as already pointed out, the repeal of Section 612 could not affect the rights of the respondent and furthermore in the case of Crump *vs.* Guyer, supra, at page 336, the Court said:

> "A failure to exercise a vested right before the passage of a subsequent statute which seeks to divest it in no wise affects or lessens that right." (Citing many cases.)

It seems clear that Section 612 of the Revenue Act of 1928 which attempted to repeal Section 1106 (a) of the Revenue Act of 1926 as of the date of its enactment had no effect on the rights of the repondent.

## VII.

## SECTION 611 OF THE REVENUE ACT OF 1928 DID NOT RECREATE ANY LIABILITY THAT HAD BEEN EXTINGUISHED BY SECTION 1106 (a) OF THE REVENUE ACT OF 1926.

The concurring opinion below advanced a separate and distinct reason why the respondent should recover in this action. This opinion made it unnecessary to determine the constitutional law question but it concluded that the respondent was entitled to recover for the reason that the repeal of Section 1106 (a) of the Revenue Act of 1926 by Section 612 did not recreate the liability extinguished by the former section. In the view of the case taken in the concurring opinion the conclusion reached is undoubtedly correct. In the case of McCulloch *vs.* Maryland, 4 Wheat. 316, Chief Justice Marshall said that "the power to tax

involves the power to destroy." Certainly no such potent power will be imposed by implication. As said in the concurring opinion below:

> "Taxes are not imposed by implication and we may not hold that a liability for a tax once imposed, but extinguished, is revived or reimposed by a retroactive repeal of the statute which extinguished the liability. . . .
>
> "No language can be found in any of the provisions of the Revenue Act of 1928 reimposing the tax or recreating the liability therefor which had been extinguished by Section 1106 (a) of the 1926 Act."

In the very recent case of Crooks *vs.* Harrelson et al., No. 24, October Term, 1930, decided by this Court on November 24, 1930, Justice Sutherland announced the following rule:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In United States *vs.* Merriam, 263 U. S. 179, 187-188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in Partington *vs.* Attorney-General, L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law, the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'"

When we adhere with strictness to the letter of the law it is quite apparent that nothing in Section 611 and Section 612 of the Revenue Act of 1928 recreated any liability that

had been extinguished by Section 1106 (a) of the Revenue Act of 1926.

## VIII.

## THE LEGAL PRINCIPLES ESTABLISHED BY THE CASES OF UNITED STATES vs. HEINSZEN, 206 U. S. 370; RAFFERTY vs. SMITH, BELL & COMPANY, 257 U. S. 226, AND CAMPBELL vs. HOLT, 115 U. S. 620, DO NOT APPLY TO THE CASE OF THIS RESPONDENT.

The petitioner in its brief stresses the above cases to sustain its position that Congress by the Revenue Act of 1928 had authority to reimpose the liability which had been extinguished by Section 1106(a) of the Revenue Act of 1926. It is submitted that the principles announced in the above cases have no application to the case of this respondent. The cases of United States *vs.* Heinszen and Rafferty *vs.* Smith, Bell & Company merely raised the question of the right of Congress to pass an act legalizing and ratifying the imposition and collection of duties by the authorities of the United States in the Philippine Islands prior to the passage of the act. The only question of constitutional law involved in this issue was whether or not Congress could pass a law imposing a tax or a duty retroactively. There is no doubt but that Congress has such power. However, the application of Section 611 of the Revenue Act of 1928, if it be held to be an attempt to deprive this respondent from recovering, presents an entirely different question of constitutional law. The Act under consideration in the Heinszen and Rafferty cases created an original liability retroactively. On the basis of the argument of the Government, Section 611 of the Revenue Act of 1928 did not result in the creation of an original liability but would be an attempt to recreate a liability that had been created by a prior revenue act, which liability had been completely extinguished by Section 1106(a) of the Revenue Act of 1926.

The year involved in this action is the fiscal year ended November 30, 1918. The Revenue Act of 1918 was passed

on February 24, 1919, and was made to apply retroactively to the year 1918. The respondent has raised no complaint about the Revenue Act of 1918 on the basis that it applied retroactively to include income accrued in the year 1918. If it had, the petitioner would have a complete answer by citing the Heinszen and Rafferty cases. However, it is submitted that this is the fullest extent to which the law in these cases can be applied.

This distinction is clearly shown by this Court in the case of Forbes Boat Line *vs.* Commissioner, 258 U. S. 338, 339. Speaking through Justice Holmes the Court said:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of United States *vs.* Heinszen & Co., 206 U. S. 370; (Rafferty *vs.* Smith, Bell & Company, 257 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. Wagner *vs.* Baltimore, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."

The case of Campbell *vs.* Holt, supra, involved the breach of a common law liability on a contract. This Court held that the expiration of the bar of limitations applied to the remedy only and did not extinguish the liability. Consequently, subsequent legislation affecting the *remedy* did not deprive the cititizen of his property without due process of law. It is quite apparent that the principle in the case of Campbell *vs.* Holt does not apply to the case of this respondent for the reason that its liability had been completely extinguished by Section 1106(a) of the Revenue

Act of 1926. The Court recognized the distinction in the case of Eberhart *vs.* United States, 204 Fed. 890, when it said:

> "They (statutes of time limitation that not only bar the remedy but extinguish the liability) are excepted from the rule announced in Campbell *vs.* Holt, 115 U. S. 628; 6 Sup. Ct. 209; 21 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the legislature may not overthrow at pleasure by extending the time for collecting it."

As far as the respondent can find no case in which the facts are similar to those in its case have been decided in favor of the Government. In fact, there does not appear to have been a dissenting opinion in any case. Decisions have been rendered against the Government on similar facts in the following cases:

Pepsin Syrup Co. *vs.* Schwaner, 35 F. (2d) 197 (S. D. Ill.).

Clinton Iron & Steel Co. *vs.* Heniner 30 F. (2d) 542 (W. D. Pa.).

Erie Coal & Coke Co. *vs.* Heiner, 33 F. (2d) 135, (W. D. Pa.).

Diamond Alkali Co. *vs.* Heiner 39 F. (2d) 643 (W. D. Pa.).

Dobbins *vs.* Comm. 31 F. (2d) 935.

Heiner *vs.* Erie Coal & Coke Co. 42 F. (2d) 214 (C. C. A. 3rd).

Wettengel *vs.* Robinson, 289 Pa. 525; 136 Atl. 673 (Sup. Ct. Penna.).

Southern Lumber Co. *vs.* U. S. (W. D. Ark.) not yet reported. See Commerce Clearing House Tax Service 1930, Vol. 3, page 8962.

The respondent particularly wishes to call the attention of this Court to the Wettengel decision by the Supreme Court of Pennsylvania in which that Court in a well-reasoned opinion held that the provisions of the Revene Act of 1928

had no effect upon the liability that had been extinguished by Section 1106(a) of the Revenue Act of 1926. The Court clearly distinguished the rule found in the case of Campbell *vs.* Holt.

## CONCLUSION.

In conclusion the respondent contends that upon the law as developed by this and other Courts the judgment of the Court of Claims in its case should be sustained.

Respectfully submitted,

FRANK J. ALBUS,
National Press Bldg.,
Washington, D. C.
*Attorney for Respondent.*

*Of Counsel:*
WILLIAM MEYERHOFF,
Washington, D. C.

FILE COPY

Office
FEB 18 1931
CHARLES ELMORE

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,

*vs.*

WYMAN PARTRIDGE & COMPANY.

## Petition of Wyman Partridge & Company For a Rehearing.

FRANK J. ALBUS,
Washington, D. C.,
*Counsel for Wyman Partridge & Company.*

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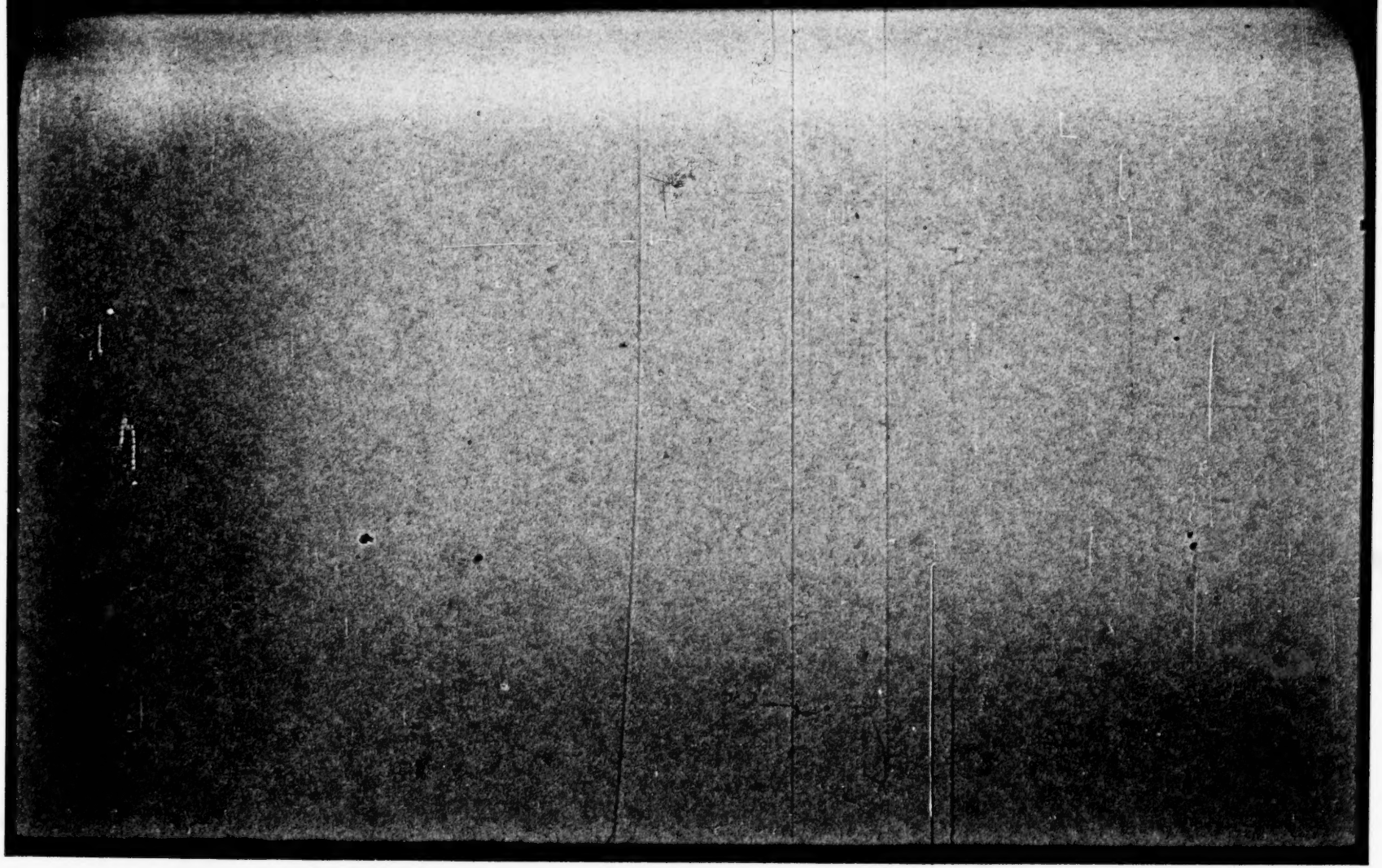


IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1930.

---

**No. 416.**

---

UNITED STATES OF AMERICA, PETITIONER,

*vs.*

WYMAN PARTRIDGE & COMPANY.

---

## Petition of Wyman Partridge & Company For a Rehearing.

---

Comes now, Wyman Partridge & Company, and presents this, its petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

The facts in the case of this petitioner are different from the facts in any other statute of limitations case that was decided by this Court under date of January 26, 1931. The collection was made from the petitioner under threat of distraint after Section 1106(a) of the Revenue Act of 1926 had completely extinguished the liability. No bond was filed by the petitioner to secure the payment of any amount after the statutory period for collection had expired and no collateral security of any kind was posted with the Collector of Internal Revenue or anyone else guaranteeing payment. These facts cause the case of this petitioner to be separate and distinct in itself and different from any other statute of limitations case that has been before this Court.

The opinion and judgment of the Court rendered on January 26, 1931, is in conflict with the decision of the Court in the case of William Danzer and Company, Inc., *vs.* Gulf

& Ship Island Railway Company, 268 U. S. 633. In that case this Court held an Act of Congress to be unconstitutional which attempted to revive a liability after that liability had been extinguished by the expiration of the statutory period of limitations. In that case this Court said:

> "On the expiration of the two-year period it was as if liability had never existed."

For the same reason when Section 1106(a) of the Revenue Act of 1926 extinguished the liability of this petitioner prior to the time the Collector of Internal Revenue enforced collection it was as if the liability had never existed. Section 611 of the Revenue Act of 1928 certainly did not create, nor did it attempt to create, any new liability. Consequently, if there was no liability when the tax was collected and no new liability was created by the Revenue Act of 1928, then there is no liability now and the Government is retaining the property of the petitioner simply because it has it. This Court, in the Danzer case, supra, held the law of Congress to be unconstitutional and it seems that the same conclusion of law should be applied in the case of this petitioner.

The opinion of the Court in the case of this petitioner contains a sentence reading as follows:

> "That Section [Section 1106(a) of the Revenue Act of 1926] was repealed as of the date of its passage by Section 612 of the Revenue Act of 1928."

The opinion and judgment of the Court holding that Section 1106(a) of the Revenue Act of 1926 could be repealed as of the date of its enactment by Section 612 of the Revenue Act of 1928 and that such repeal could effect rights which accrued while Section 1106(a) of the Revenue Act of 1926 was in force, is in conflict with the decisions of this Court in the cases of Memphis *vs.* United States, 97 U. S. 283; Lincoln *vs.* United States, 202 U. S. 485; Fletcher *vs.* Peck, 10 U. S. 75, and Frost *vs.* Corporation Commissioner, 278 U. S. 515.

In the Memphis case this Court said:

> "We do not deny that it is competent for a legislature to repeal an act which when it was passed was a mere gratuity, if while it was in existence no vested rights have been acquired under it or in virtue of it."

Chief Justice Marshall in Fletcher *vs.* Peck, supra, said:

> "The principle asserted is that, one legislature is competent to repeal an act which a former legislature was competent to pass; and that one legislature can not abridge the powers of a succeeding legislature. The correctness of this principle so far as respects general legislation can never be controverted. But if an act be done under a law, a succeeding legislature can not undo it. The past can not be recalled by the most absolute power."

And Mr. Justice Sutherland in Frost *vs.* Corporation Commissioner, supra, said:

> "An existing statute can not be recalled or restricted by anything short of a constitutional enactment."

The opinion and judgment of the Court rendered under date of January 26, 1931, is in conflict with the above decisions of this Court.

The opinion of the Court states that Congress had constitutional authority under the circumstances set forth in Section 611 of the Revenue Act of 1928 to cure the defect in administration which had resulted in the collection of the tax after the statute of limitations had run and to deny recovery to the taxpayers for the amount paid. In the case of this petitioner, where the liability had been completely extinguished by Section 1106(a) of the Revenue Act of 1926, the pertinent provisions of the Revenue Act of 1928 did not attempt to cure any "administration" defect but attempted to nullify a prior Act of Congress and to completely destroy and divest rights which had accrued while the Revenue Act of 1926 was in effect. To hold that Congress has any such power is in conflict with the decisions already cited.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the decree of this Court be, upon further consideration, reversed.

Respectfully submitted,

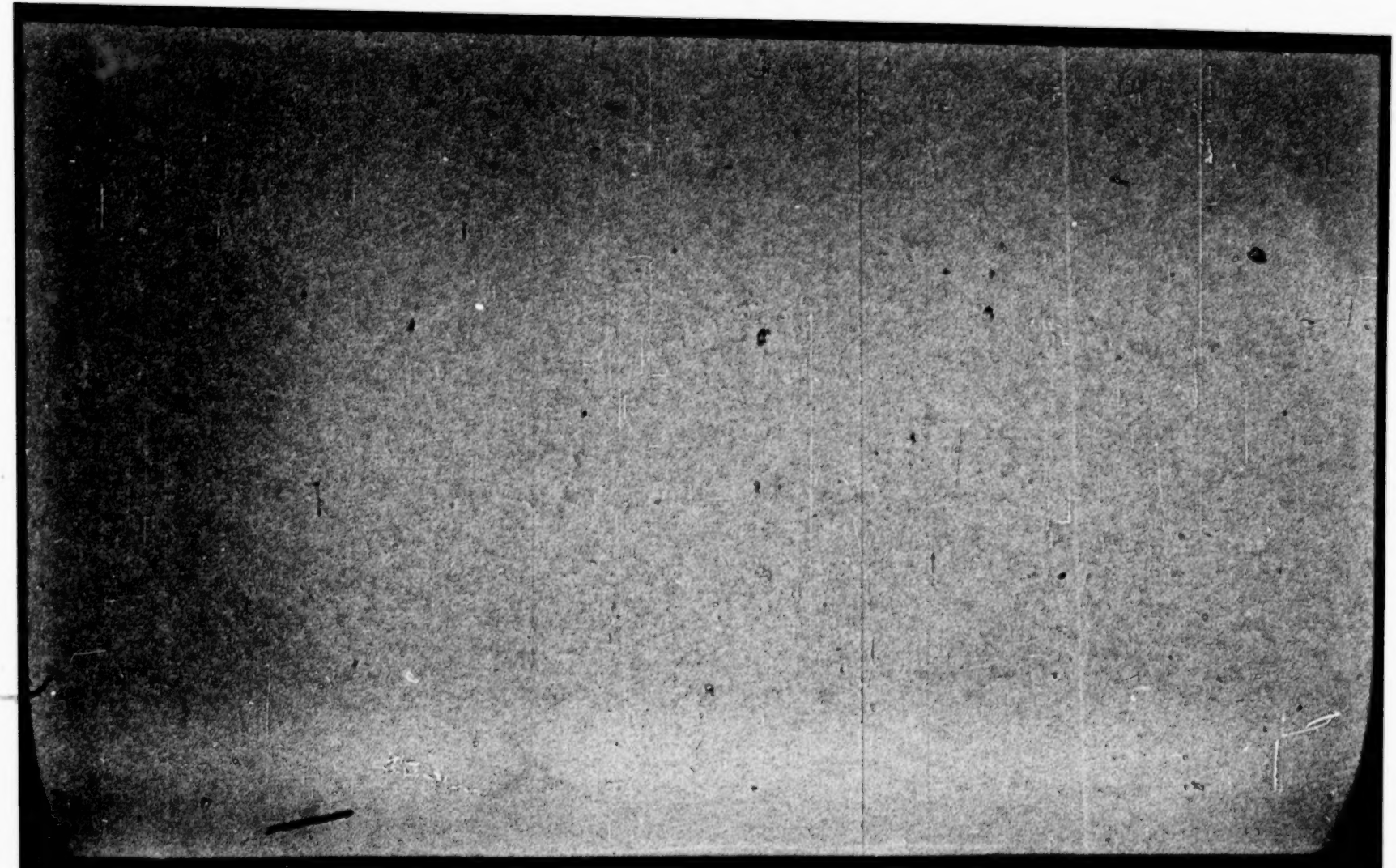
FRANK J. ALBUS,
Washington, D. C.,
*Counsel for Wyman Partridge & Company.*

---

## CERTIFICATE OF COUNSEL.

I, FRANK J. ALBUS, counsel for the above-named Wyman Partridge & Company, do hereby certify that the foregoing petition for a rehearing in this cause is presented in good faith and not for delay.

FRANK J. ALBUS,
*Counsel for Wyman Partridge & Company.*



CLERK'S COPY.

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

### OCTOBER TERM, 1930

No. 508

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

ERIE COAL & COKE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

**PETITION FOR CERTIORARI FILED OCTOBER 9, 1930**
**CERTIORARI GRANTED NOVEMBER 24, 1930**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

---

No. —

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

ERIE COAL & COKE COMPANY

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court, Western Pennsylvania

ERIE COAL & COKE COMPANY, A CORPORATION, APPELLEE

vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-third District of Pennsylvania, appellant

*Docket entries*

April 24, 1928. Præcipe for Summons in assumpsit and statement of claim filed. Summons issued.

April 25, 1928. Summons returned served by handing to and leaving a true and attested copy with D. B. Heiner at Pittsburgh, Pa., on April 24, 1928.

May 7, 1928. Præcipe for appearance of John D. Meyer and Wm. J. Aiken for defendant filed.

August 1, 1928. Affidavit of defense filed.

Oct. 1, 1928. Præcipe for trial list filed.

Oct. 26, 1928. Waiver of a jury filed.

Nov. 20, 1928. Stipulation of facts filed. Addition to stipulation of facts filed. Trial without a jury before McVicar, J. Trial closes.

Jan. 28, 1929. Opinion filed and entered holding that the plaintiff is entitled to recover from the defendant.

Jan. 29, 1929. Certificate of probable cause filed.

Feb. 6, 1929. Order filed and entered directing that judgment be entered in favor of the plaintiff Erie Coal and Coke Co. and against the defendant, D. B. Heiner, Internal Revenue Collector, in the sum of $65,706.07, together with interest from April 20, 1926.

2 April 30, 1929. On petition of defendant, order entered allowing an appeal. Bill of exceptions sealed by the court and filed. Assignment of error filed. Citation issued, returnable May 30, 1929.

May 6, 1929. Stipulation for printing the record filed.

In United States District Court

*Statement of claim*

Filed Apr. 24, 1928

Erie Coal & Coke Company, plaintiff above named, brings this suit against D. B. Heiner, collector of the United States internal revenue for the Twenty-third District of Pennsylvania, defendant above named, to recover the sum of $65,706.07, with interest thereon from April 20, 1926, upon a cause of action of which the following is a statement:

1. Erie Coal & Coke Company is and was at the times herein mentioned, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal office or place of business in Grove City, in the county of Mercer, in said Commonwealth.

2. D. B. Heiner, at the time of the payment of the tax hereinafter mentioned was and still is the collector of the United States internal revenue for the Twenty-third District of Pennsylvania, being
3 duly commissioned as such pursuant to the laws of the United States of America. The said D. B. Heiner is a citizen of the State of Pennsylvania and a resident of the city of Pittsburgh in the said Western District of Pennsylvania.

3. Plaintiff, on April 1, 1918, filed its income and excess-profits tax return for the calendar year 1917 and paid the tax shown to be due thereon, to wit, $24,456.07.

4. In the month of March, 1921, on additional list 591, Schedule 3879, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the said calendar year 1917 in the sum of $133,252.97.

5. Plaintiff filed a claim in abatement against said additional tax assessment of $133,252.97, pursuant to which claim said additional assessment was reduced by the sum of $67,546.90. The balance of said claim for abatement, to wit, $65,706.07, was, on or about March 23, 1926, rejected.

6. Thereupon, defendant proceeded to collect said balance of $65,706.07, and on April 20, 1926, pursuant to notice of distraint warrants and under threat of actual distraint by the said defendant, plaintiff paid to defendant said sum of $65,706.07.

7. Plaintiff avers that at the time the proceedings to collect said additional tax assessment were instituted, and at the time of
4 the payment thereof, as aforesaid, plaintiff's liability, if any, for the payment thereof had been extinguished and the collection of said tax was barred by the statutes of limitation then in force and effect and as enacted by the Congress of the United States.

8. Plaintiff further avers that on April 27, 1927, it filed with defendant a claim for refund for said tax illegally collected as aforesaid, but said claim for refund has not been acted upon.

9. Plaintiff is advised and believes, and therefore avers, that there existed no warrant in law for demanding and collecting from the plaintiff by the defendant of the said additional tax assessment: that the collection of the said tax on April 20, 1926, was barred by the statutes of limitation then in effect, and that plaintiff's liability, if any, for the payment of said tax had then been extinguished; and the plaintiff avers that the said tax of $65,706.07 was erroneously and illegally collected and erroneously and illegally retained by the defendant, and the plaintiff further avers that no part of the said tax of $65,706.07 has been repaid to the plaintiff, and the whole amount thereof, with interest thereon from April 20, 1926, remains due and owing from the defendant to the plaintiff.

Wherefore plaintiff brings this suit.

BROWN & MCCAWLEY,
ROSE & EICHENAUER,
*Attorneys for Plaintiff.*

Duly sworn to by Levi Deal; jurat omitted in printing.

5 In United States District Court

*Affidavit of defense*

Filed Aug. 1, 1928

Comes now D. B. Heiner, defendant above named, and alleges that he has a full, true, just, and legal defense to all of plaintiff's statement of claim, and that the nature of the defense is as follows:

1. The allegations contained in paragraph "1" of the statement of claim are admitted.

2. The allegations contained in paragraph "2" of the statement of claim are admitted.

6 3. The allegations contained in paragraph "3" of the statement of claim are admitted.

4. The allegations contained in paragraph "4" of the statement of claim are admitted.

5. The allegations contained in paragraph "5" of the statement of claim are admitted, but the defendant avers in addition that the said claim in abatement was filed before the statute of limitations applicable to the collection of said additional assessment of $133,252.97 had expired; that said claim in abatement was pending as to the $65,706.07 additional taxes here in issue until March 23, 1926, when it was finally rejected for said amount of $65,706.07; that during the period in which said claim in abatement was pending the collection of the said additional tax of $65,706.07 was stayed and prevented by reason of the fact that said claim was pending before the Bureau of Internal Revenue.

6. The allegations contained in paragraph "6" of the statement of claim are admitted.

7. In answer to the allegations contained in paragraph "7" of the statement of claim defendant denies that at the time the proceedings to collect said tax were instituted and/or at the time of the payment thereof plaintiff's liability for payment thereof had been extinguished; and defendant also denies that the collection thereof was barred by the statutes of limitation then applicable thereto.

7 On the contrary, defendant avers that said collection was made on April 20, 1926, within one year subsequent to the denial of the claim in abatement mentioned and described in said statement of claim, which said claim in abatement was filed on May 4, 1921, within two months of the assessment of said additional tax for the year 1917 in the month of March, 1921. Defendant further alleges that said claim in abatement was accompanied by bond filed by the plaintiff with the defendant conditioned upon the payment by the plaintiff of any part of said additional tax still found due after consideration of the claim in abatement and action thereon by the Commissioner of Internal Revenue. This bond was in full force and effect until the payment of said $65,706.07, at which time there was substituted a bond in the penal sum of $22,000.00, conditioned upon the payment

of interest upon the said sum of $65,706.07. Defendant further alleges that the Commissioner of Internal Revenue accepted an offer in compromise of said interest liability in the sum of $2,500.00, the payment of which was made by plaintiff to the Commissioner of Internal Revenue in lieu of said interest.

8. The allegations contained in paragraph "8" of the statement of claim are admitted, except that defendant denies that said tax was illegally collected, and alleges, on the contrary, that the collection thereof was in all respects just and legal.

9. In answer to the allegations contained in paragraph "9" of the statement of claim, defendant admits that no part of the said
8 $65,706.07 has been repaid to the plaintiff, but denies each and every other allegation contained in said paragraph, and further alleges that the collection of said tax was in all respects legal and just and made within the period of limitation properly applicable thereto and while the liability of the plaintiff therefor was in full force and effect.

Wherefore defendant owes the plaintiff nothing and demands judgment in his favor and his costs in this behalf expended.

D. B. HEINER,
*Collector of Internal Revenue.*
JOHN D. MEYER,
*United States Attorney for the Western District of Pennsylvania.*
WM. J. AIKEN,
*Assistant U. S. Attorney for the Western District of Pennsylvania.*
JOHN A. McCANN,
*Special Assistant to the U. S. Attorney.*
*Attorneys for the Defendant.*

Duly sworn to by D. B. Heiner: jurat omitted in printing.

9 In United States District Court

*Bill of exceptions*

Filed Apr. 30, 1929

Be it remembered that at the trial of this cause in this court at the regular November, A. D. 1928, term thereof, holden in the city of Pittsburgh, Pennsylvania, before the Honorable Nelson T. McVicar, district judge, the following proceedings were had:

The services of a jury were waived by written stipulation filed with the clerk, and the cause was tried to the court without a jury on the twenty-fifth day of January, A. D. 1929. The following proceedings were had at the trial:

The parties filed a written stipulation of facts, as follows:

10 *Stipulation of facts*

It is hereby, stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. Erie Coal & Coke Company is and was on April 1, 1918, and at all times subsequent thereto a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and having its principal office or place of business in Grove City, in the county of Mercer, in said Commonwealth.

2. D. B. Heiner at the time of the payment of the tax hereinafter mentioned was and now is collector of the United States internal revenue for the Twenty-third District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America. The said D. B. Heiner is a citizen of the State of Pennsylvania.

3. Erie Coal & Coke Company, the plaintiff, on April 1st, 1918, filed its tentative income and excess profits tax return for the calendar year 1917, and on June 11th filed its completed return and paid the tax shown to be due thereon, to wit, $24,456.07.

4. In the month of March, 1921, on additional list 591,
11 Schedule 3879, the Commissioner of Internal Revenue assessed an additional tax against plaintiff, for the said calendar year 1917 in the sum of $133,252.97.

5. Plaintiff on May 4, 1921, filed a claim in abatement against said additional tax assessment of $133,252.97, pursuant to which claim said additional assessment was reduced by the sum of $67,546.90. The balance of said claim for abatement, to wit, $65,706.07, was, on or about March 23, 1926, rejected.

6. Thereupon defendant proceeded to collect said balance of $65,706.07, and on April 20, 1926, pursuant to notice of distraint warrants and under threat of actual distraint by the said defendant, plaintiff paid to defendant said sum of $65,706.07.

7. On April 27, 1927, plaintiff filed with defendant a claim for refund for said tax collected as aforesaid, to wit, $65,706.07, but said claim for refund has not been acted upon.

8. When plaintiff on May 4, 1921, filed its claim in abatement said claim was accompanied by a bond conditioned upon the payment by the plaintiff of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment by plaintiff of the said sum of $65,706.07, at which time there was substituted a bond in the penal sum of $22,000.00 conditioned upon the payment of interest upon the said sum of $65,706.07. Plaintiff made an offer in compromise of

12 said interest charge in the sum of $2,500.00, which offer was accepted by the Commissioner of Internal Revenue, and plaintiff accordingly paid said sum.

ROSE AND EICHENAUER,
*Attorneys for Plaintiff.*
JOHN D. MEYER,
*U. S. Attorney,*
JOHN A. MCCANN,
*Special Ass't.,*
*Attorneys for Defendant.*

Thereafter a supplemental stipulation of facts was filed by the parties, as follows:

*Additional stipulation of facts*

By leave of court first had and obtained, it is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts, in addition to those already stipulated, shall be taken as true in this case, provided, however, that this stipulation shall be without prejudice to either party to introduce other and further evidence not inconsistent to the facts herein stipulated to be true:

I

13 No consent in writing between the taxpayer and the Commissioner of Internal Revenue, extending the statutory period of limitation (such consents being commonly known and designated as waivers), has ever been entered into in this case.

II

Attached hereto is a true copy of the bond referred to in paragraph eight of former stipulation.

H. B. MCCAWLEY,
ROSE & EICHENAUER,
*Attorneys for Plaintiff.*
JOHN D. MEYER,
*U. S. Attorney,*
JOHN A. MCCANN,
*Special Assistant,*
*Attorneys for the Defendant.*

*Bond covering claim for the abatement of income and profits taxes*

Know all men by these presents, that Erie Coal and Coke Company, as principal, and Globe Indemnity Company, of Newark, New Jersey, as surety, are held and firmly bound unto the United States of America in the sum of three hundred twenty-five thousand and no/100 ($325,000.00) dollars, lawful money of the United States, for

the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

14 Whereas, the above-bounden principal has been assessed income profits taxes for the year 1917 and claims that the whole portion thereof has been illegally assessed against it and desires to file a claim for the abatement thereof, and further desires that the collection of the amount covered by said claim for abatement be deferred until such time as that claim has been finally determined by the Commissioner of Internal Revenue; and

Whereas, in case such claim is filed payment of the amount of tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany its claim with a bond in double the amount of the tax covered by the claim, with surety satisfactory to the Commissioner of Internal Revenue, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double the amount of tax covered by such claim for abatement:

Now, therefore the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the Commissioner of Internal Revenue to be due, with interest at the rate of one (1%) per cent and (½%) per cent per month from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

15 Witness our hands and seals this 29th day of May, A. D. 1924.

ERIE COAL AND COKE COMPANY.
By ——— ———, *President.*

Attest:

——— ———, *Secretary.*
GLOBE INDEMNITY COMPANY.
By CHARLES A. REID.
*Resident Vice President.*

Attest:

F. M. BROWN.
*Resident Asst. Secretary.*

Thereafter defendant filed the following written proposed findings of fact and conclusions of law.

*Defendant's proposed findings of fact and conclusions of law*

Comes now D. B. Heiner, defendant above named, and, deeming the facts stated in the stipulation of facts heretofore filed by the parties material to the issues herein involved, asks the court to find them as stated in the said stipulation.

*Conclusions of law*

And from those facts the court is respectfully requested to draw the following conclusions of law:

16 1. Section 611 of the revenue act of 1928 applies to this case.

2. The collection of the tax here involved was "stayed" within the meaning of section 611 of the revenue act of 1928.

3. Section 611 of the revenue act of 1928 prevents the collection of the $65,706.07 here in controversy from being considered an overpayment.

4. The tax here in question can not be recovered.

5. Defendant is entitled to judgment in his favor and against the plaintiff.

D. B. HEINER, *Defendant.*
JOHN D. MEYER,
*United States Attorney for the Western District of Pennsylvania,*
JOHN A. MCCANN,
*Special Assistant to the U. S. Attorney,*
*Attorneys for the Defendant.*

Defendant then filed the following motion for judgment, which was denied, with exceptions saved to the defendant:

*Motion for judgment*

Comes now D. B. Heiner, defendant above named, by his
17 attorneys, and moves the court for a judgment in his favor on the ground that the pleadings and the evidence are insufficient to sustain a judgment in favor of the plaintiff.

JOHN D. MEYER,
*United States Attorney for the Western District of Pennsylvania,*
JOHN A. MCCANN,
*Special Assistant to the U. S. Attorney,*
*Attorneys for the Defendant.*

Thereafter, and on January 28, A. D. 1929, the court made, formed, and rendered the following finding of fact, conclusions of law, and opinion:

*Opinion*

MCVICAR, J.:

This is an action by the Erie Coal and Coke Company against D. B. Heiner, collector of Internal Revenue, to recover the sum of $65,706.07, with interest from April 20, 1926, being the amount of a tax paid by the plaintiff to the defendant, which the plaintiff alleges was illegal. The parties filed a stipulation waiving trial by jury and

agreeing that the cause may be tried by the court. The parties also agreed upon the facts which the court finds as follows:

1. Erie Coal and Coke Company is and was on April 1, 1918, and at all times subsequent thereto a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and having its principal office or place of business in Grove City, in the county of Mercer, in said Commonwealth.

18 2. D. B. Heiner at the time of the payment of the tax hereinafter mentioned was and now is collector of the United States internal revenue for the Twenty-third District of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States of America. The said D. B. Heiner is a citizen of the State of Pennsylvania and a resident of the city of Pittsburgh in the said Western District of Pennsylvania.

3. Erie Coal and Coke Company, the plaintiff, on April 1st, 1918, filed its tentative income and excess profits tax return for the calendar year 1917, and on June 11th filed its completed return, and paid the tax shown to be due thereon, to wit, $24,456.07.

4. In the month of March, 1921, on additional list 591, Schedule 3879, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the said calendar year 1917 in the sum of $133,252.97.

5. Plaintiff, on May 4, 1921, filed a claim in abatement against said additional tax assessment of $133,252.87, pursuant to which claim said additional assessment was reduced by the sum of $67,546.90. The balance of said claim for abatement, to wit, $65,706.07, was, on or about March 23, 1926, rejected.

6. Thereupon, defendant proceeded to collect said balance of $65,706.07, and on April 20, 1926, pursuant to notice of distraint warrants and under threat of actual distraint by the said 19 defendant, plaintiff paid to defendant said sum of $65,706.07.

7. On April 27, 1927, plaintiff filed with defendant a claim for refund for said tax collected as aforesaid, to wit, $65,706.07, but said claim for refund has not been acted upon.

8. When plaintiff, on May 4, 1921, filed its claim in abatement, said claim was accompanied by a bond conditioned upon the payment by the plaintiff of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment by plaintiff of the said sum of $65,706.07, at which time there was substituted a bond in the penal sum of $22,000.00 conditioned upon the payment of interest upon the said sum of $65,706.07. Plaintiff made an offer in compromise of said interest charge in the sum of $2,500.00, which offer was accepted by the Commissioner of Internal Revenue, and plaintiff accordingly paid said sum.

9. No consent in writing between the taxpayer and the Commissioner of Internal Revenue extending the statutory period of limitation (such consents being commonly known and designated as waivers) has ever been entered into in this case.

*Conclusions of law*

1. The tax of $65,706.07 paid by the plaintiff to the defendant April 20, 1926, was barred under the existing statutes of limitations.

20 2. Sections 607 and 611 of the revenue act of 1928 are not applicable to the facts of this case.

3. The plaintiff is entitled to judgment with costs.

Discussion

The Erie Coal and Coke Company, in April and June of 1918, filed its tentative income and excess profits tax for the year 1917 and paid the tax shown thereon, $21,456.07. In March, 1921, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the year 1917 in the sum of $133,252.97. May 4, 1921, plaintiff filed a claim in abatement for said additional tax assessment, which was reduced in the sum of $67,546.90; the balance of the claim, $65,706.07, was rejected March 23, 1926. April 20, 1926, plaintiff, pursuant to notice of distraint warrants and under threat of actual distraint, paid said sum of $65,706.07. April 27, 1927, plaintiff claimed a refund of defendant for the amount of the tax paid which has not been acted upon.

It is admitted that the tax paid April 20, 1926, of $65,706.07 was barred at the time of payment under the then existing statutes of limitations. The question involved therefore is, as stated by the defendant—Is recovery of the tax paid by the plaintiff subsequent to the expiration of the statute of limitations upon collection precluded by section 611 of the revenue act of 1928? Defendant answers this question in the affirmative, plaintiff in the negative. We are

21 of the opinion that section 611 is not applicable and, therefore, that the plaintiff is entitled to recover. Sections 607 and 611 of the revenue act of 1928 are as follows:

"Section 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"Section 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part was stayed, then the payment of

such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments, made after the expiration of the period of limitation on assessment and collection."

This court, in an opinion by Judge Gibson (which we follow herein) in the case of Clinton Iron and Steel Company vs. D. B. Heiner, Collector of Internal Revenue, No. 5650, Law, decided this month, held that the sections aforesaid are not applicable. Judge Gibson, in his opinion, said:

22 "Section 607 of the act of 1928 declares any payment of tax assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be refunded or credited to the taxpayer if demand therefor is made in due time. Section 611 of the same act provides that no such payment shall be considered an overpayment if a claim in abatement of the tax was filed and the collection of the tax was stayed. It is claimed on behalf of the defendant that section 611 retroactively ratified the collection of tax which was illegal under existing laws at the time it was made.

"Congress may, under certain circumstances, ratify an erroneous collection of tax retroactively. United States v. Heinszen & Co., 206 U. S. 370; Rafferty v. Smith, Bell & Co., 257 U. S. 226. The situation in the case at bar, however, is not that of the cases cited. In the instant case the tax was collected by the defendant as collector of internal revenue at a time when existing statutory law declared that not only was the right of collection barred but that the liability had been extinguished. The plaintiff, by statute, was denied relief by injunction. It could do nothing but pay the amount unlawfully demanded and seek its remedy in an action against the collector. Before bringing such action it was required by statute to first demand the return of the amount paid from the Commissioner of Internal Revenue, it is true; nevertheless the suit is not against the

23 United States but a personal action against the collector based upon his illegal collection. The United States is interested not at all until and except its proper executive officer, in the exercise of a discretion conferred upon him by statute, adopts the liability of the collector as that of the United States. Sage v. United States, 250 U. S. 33.

"Keeping in mind the nature of the present action, it seems plain that section 611 of the revenue act of 1928 furnishes no defense to the defendant. That section is not a specific retroactive ratification of the illegal collection by the defendant as its agent (as were the statutes under consideration in United States v. Heinszen and Rafferty v. Smith, Bell & Co., supra), but a statute designed to control the commissioner and his agent. If it has any retroactive force, it is in respect to a demand upon the United States for the return of an amount voluntarily paid and not in connection with a personal suit theretofore brought against a collector of internal revenue to recover

an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

We are of the opinion that the plaintiff is entitled to recover, and therefore direct that a form of order for judgment in its favor in accordance with this opinion, be prepared and submitted to the court.

Thereafter, and on January 29, A. D. 1929, the court rendered the following certificate of probable cause:

24 *Certificate of probable cause*

And now, on this 29th day of January, A. D. 1928, the court, having been fully advised in the premises, hereby certifies that inasmuch as it appears of record in this case that the collector of internal revenue was acting pursuant to instructions from the Commissioner of Internal Revenue, there was probable cause for the collection of Federal taxes and interest thereon from the plaintiff, as shown by the record in this cause.

Per curiam.

V.

Thereafter, and on February 6, A. D. 1929, the court rendered the following judgment, to which the defendant objected and excepted, and his exceptions were allowed:

*Judgment*

And now, February 6, 1929, judgment is hereby entered in favor of plaintiff, Erie Coal and Coke Company, a corporation, and against defendant, D. B. Heiner, collector of internal revenue for the Twenty-third District of Pennsylvania, in the sum of $65,706.07, together with interest thereon from April 20, 1926, as provided by law.

Per curiam.

To the entry of which judgment the defendant objects and excepts and his exception is allowed and bill sealed.

W. H. S. Thompson.

25 In United States District Court

*Order settling bill of exceptions*

And now, in furtherance of justice and that right may be done, and inasmuch as the matters and things above set forth do not appear of record in said cause, and to the end that the same may be preserved in the record and presented to the honorable United States Circuit Court of Appeals for the Third Circuit, the defendant tenders and presents the foregoing as its bill of exceptions in this cause, and prays that the same may be allowed, settled, signed, sealed, made a part of the record, and ordered filed, which is accordingly done this thirtieth day of April, A. D. 1929, after presentation to opposing counsel for inspection, and within the period in which an appeal may lie from

the judgment of the court in this cause, rendered and entered on February 6, A. D. 1929.

NELSON McVICAR,
*Judge for the District Court of the United States for the Western District of Pennsylvania.*

Examined, approved, and agreed upon this 30th day of April, A. D. 1929.

ROSE & EICHENAUER,
*Attorneys for the Plaintiff.*

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In United States District Court

*Judgment*

Filed Feb. 6, 1929

And now, February 6th, 1929, judgment is hereby entered in
26 favor of plaintiff, Erie Coal and Coke Company, a corporation, and against defendant, D. B. Heiner, collector of internal revenue for the Twenty-third District of Pennsylvania, in the sum of $65,706.07, together with interest thereon from April 20, 1926, as provided by law.

Per curiam.

To the entry of which judgment the defendant objects and excepts, and his exception is allowed and bill sealed.

W. H. S. THOMPSON.

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In United States District Court

*Assignment of errors*

Filed Apr. 30, 1929

Comes now D. B. Heiner, collector of internal revenue for the 23rd District of Pennsylvania, defendant in the above-entitled case, and in connection with his appeal from the judgment of this honorable court, rendered herein on February 6, 1929, presents to the court his assignment of errors which he alleges were committed in the trial and proceedings in the above-entitled cause to his prejudice and injury as follows:

1. The court erred in rendering judgment for the plaintiff.
2. The court erred in denying defendant's motion for judgment and in failing to render judgment in defendant's favor.
27 3. The facts found will not support a judgment in favor of the plaintiff.
4. The stipulated facts will not support a judgment in favor of the plaintiff.

5. The court erred in holding that the tax of $65,706.07 paid by the plaintiff to the defendant April 20, 1926, was barred under the existing statutes of limitations.

6. The court erred in holding that sections 607 and 611 of the revenue act of 1928 are not applicable to the facts of this case.

7. The court erred in holding that the plaintiff is entitled to judgment with costs.

8. The court erred in failing to hold that section 611 of the revenue act of 1928 prevents the collection of the $65,706.07 here in controversy from being considered an overpayment.

Wherefore the defendant prays that the judgment rendered herein be reversed with directions to the District Court of the United States for the Western District of Pennsylvania to render judgment in favor of the defendant below.

JOHN D. MEYER,
*United States Attorney for the Western District of Pennsylvania,*
JOHN A. MCCANN,
*Special Assistant to the U. S. Attorney,*
*Attorneys for the Defendant.*

28 In United States District Court

*Petition for appeal and order allowing appeal*

Filed Apr. 30, 1929

The above-named defendant, conceiving himself aggrieved by the judgment made and entered on the 6th day of February, 1929, in the above-entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

JOHN D. MEYER,
*United States Attorney for the Western District of Pennsylvania,*
JOHN A. MCCANN,
*Special Assistant to the U. S. Attorney,*
*Attorneys for the Defendant.*

The foregoing claim of appeal is allowed this 30th day of April, A. D. 1929.

NELSON MCVICAR,
*United States District Judge.*

29 In United States District Court

*Stipulation for printing the record*

Filed May 6, 1929

It is hereby stipulated and agreed by and between Rose and Eichenauer, attorneys for the plaintiff, and John D. Meyer, United States attorney for the Western District of Pennsylvania, and John A. McCann, special assistant to the United States attorney, attorneys for the defendant, that the following be printed as and constitute the record on appeal in the above case before the United States Circuit Court of Appeals for the Third Circuit:

1. Docket entries.
2. Statement of claim.
3. Affidavit of defense.
4. Bill of exceptions.
5. Judgment entered February 6, 1929.
6. Assignments of error.
7. Petition for appeal and order allowing appeal.
8. This stipulation.
9. Clerk's certificate.

ROSE & EICHENAUER,
*Attorneys for the Plaintiff,*
JOHN D. MEYER,
*United States Attorney for the Western District of Pennsylvania,*
JOHN A. MCCANN,
*Special Assistant to the U. S. Attorney,*
*Attorneys for the Defendant.*

30 [Clerk's certificate to foregoing transcript omitted in printing.]

31 [Minute entry of argument and submission, Jan. 8, 1930, omitted in printing.]

32 In United States Circuit Court of Appeals, Third Circuit

No. 4138. October term, 1929

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, APPELLANT

v.

ERIE COAL AND COKE COMPANY, APPELLEE

Appeal from the District Court of the United States for the Western District of Pennsylvania

*Opinion*

Filed July 9, 1930

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges

BUFFINGTON, J.:

In the court below the Erie Coal and Coke Company brought suit against Heiner, collector of internal revenue, to recover taxes unjustly, it alleged, collected from it and paid under protest. It recovered a judgment for the amount claimed. Whereupon the collector took this appeal. The primary question is whether recovery for the taxes—which were unlawfully collected on April 20, 1926—was barred by the statute of limitations.

In considering that question we note that on April 20, 1926, when these taxes, viz, $67,706.07, were collected and paid under protest, they were barred, inasmuch as sec. 1106 (a) of the revenue act of
33 1926 provided "The bar of the statute of limitations against the United States in respect to any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability." Such being the situation, the United States having no right to the money so paid, we inquire by what right it retains this illegally collected sum or what statute creates and imposes any new liability upon the taxpayer or precludes it from recovering back the illegally collected sum. We agree with the view of the trial judge and with the holding by the same court in Clinton v. Heiner, 30 Fed. (2) 542, that sec. 611 of the revenue act of 1928 had no such effect and consequently the judgment below is affirmed.

A true copy:

Teste:

_____,

*Clerk of the United States Circuit Court of Appeals for the Third Circuit.*

34 In United States Circuit Court of Appeals, Third Circuit

No. 4138 (list No. 89). October term, 1929.

D. B. HEINER, COLLECTOR, APPELLANT

v.

ERIE COAL & COKE CO., APPELLEE

On appeal from the District Court of the United States for the Western District of Pennsylvania.

*Judgment*

Filed July 9, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, July 9, 1930.

Per curiam.

BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

35 [Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

*Order allowing certiorari*

Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

25597—30

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 508

# In the Supreme Court of the United States

OCTOBER TERM, 1930

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

*v.*

ERIE COAL & COKE COMPANY

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF**

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# In the Supreme Court of the United States

OCTOBER TERM, 1930

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No. —

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-Third District of Pennsylvania, petitioner

*v.*

ERIE COAL & COKE COMPANY

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF**

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**PETITION**

The Solicitor General, on behalf of D. B. Heiner, Collector of Internal Revenue, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above case on July 9, 1930 (R. 17), affirming the judgment of the United States District Court for the Western District of Pennsylvania (R. 13).

## QUESTIONS PRESENTED

1. Whether the respondent is deprived of the right it would otherwise have had to recover taxes collected after the statutory period of limitations had expired, because it executed a bond conditioned upon the payment of the taxes in question.

2. If the respondent's action is not barred because of its execution of the bond, whether Sections 607, 611, and 612 of the Revenue Act of 1928 should be construed to prevent its recovery.

3. Whether the sections, if so construed, are constitutional.

## STATEMENT

Respondent's tentative income and excess profits tax return for the calendar year 1917 was filed April 1, 1918, and its completed return was filed June 11, 1918. (R. 9.) The Federal tax liability reported thereon was assessed and paid. In March, 1921, the Commissioner of Internal Revenue assessed an additional tax against respondent for said year in the sum of $133,252.97. (R. 9.) This assessment was made within the period of limitations. On May 4, 1921, respondent filed a claim in abatement against this additional assessment, pursuant to which the assessment was reduced by the sum of $67,546.90 and the balance of the claim for abatement in the sum of $65,706.07 was rejected on March 23, 1926. (R. 9.) On April 20, 1926, pursuant to notice of distraint, petitioner collected from respondent the balance of $65,706.07. (R. 9.)

On April 27, 1927, respondent filed with petitioner a claim for refund of the additional tax collected. The Commissioner of Internal Revenue has not acted upon said claim for refund. (R. 9.)

When respondent filed its claim in abatement on May 4, 1921, the claim was accompanied by a bond conditioned upon the payment by respondent of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment of the sum of $65,706.07, at which time another bond was substituted for it, which was conditioned upon the payment of interest which is not in issue herein. (R. 9.) The first bond recited that the taxpayer desired that collection of the amount assessed be deferred until final determination of the claim for abatement and that payment was not to be required until then. (R. 6–7.)

This suit was instituted on April 24, 1928, to recover the additional tax so paid. The Revenue Act of 1928 became law on May 29, 1928. The petitioner contended that the respondent's suit was barred because of its execution of the bond conditioned upon the payment of the tax, but the Circuit Court of Appeals did not mention this point in its opinion. The petitioner also contended that the provisions of Section 611 of the Revenue Act of 1928 (*infra,* pp. 8–9), effectively barred a recovery of the amount in controversy. Respondent contended and the Circuit Court of Appeals held

that Section 611 could not be applied for the reason that the amount in suit was paid subsequent to the enactment of Section 1106 (a) of the Revenue Act of 1926 (*infra*, p. 8), and at a time when by reason of the provisions of Section 1106 (a) respondent's liability for such additional tax had been extinguished.

Judgment for the respondent was entered by the District Court of the United States for the Western District of Pennsylvania for $65,706.07, with interest (R. 13), which judgment was affirmed by the United States Circuit Court of Appeals for the Third Circuit (R. 17).

## SPECIFICATION OF ERRORS

I. The Circuit Court of Appeals erred in refusing to hold that recovery of the amount in suit in this case was barred because of the execution of a bond conditioned upon payment of the tax.

II. The Circuit Court of Appeals erred in holding that the provisions of Section 611 of the Revenue Act of 1928 did not preclude a refund or recovery of the amount in suit in this case.

III. The Circuit Court of Appeals erred in refusing to recognize the power of Congress to specify the conditions under which a recovery may be had of moneys paid to or collected by the United States as taxes.

IV. The Circuit Court of Appeals erred in failing to hold that Section 1106 (a) of the Revenue

Act of 1926 was retroactively repealed by Section 612 of the Revenue Act of 1928.

V. The Circuit Court of Appeals erred in affirming the judgment of the District Court in favor of the respondent.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals, in refusing to hold that recovery was barred because of the bond, is apparently in conflict with the decision of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370. It is also in conflict with the decision of the Court of Claims in *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309, now pending before this Court on a petition for certiorari which is not opposed by the Government. (No. 400, October Term, 1930.) (These cases are discussed on pp. 9–10, *infra*.)

2. A petition for a writ of certiorari has been filed in *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, involving substantially the same questions as those in the instant case which involve the above-mentioned sections of the Revenue Acts of 1926 and 1928.

3. The construction and application of Section 611 of the Revenue Act of 1928 is already before this Court in three cases in which certiorari has been granted on petitions of taxpayers which the Government did not oppose—*Graham* v. *Goodcell*, No. 36, October Term, 1930; *Magee* v. *United States*,

No. 65, October Term, 1930; *Oak Worsted Mills* v. *United States,* No. 104, October Term, 1930. Petitions for certiorari have also been filed by the taxpayers in several other cases which the Government has not opposed, and which are now pending before this Court. The facts in the instant case are similar to those in the above-mentioned cases, except that in the instant case the tax was paid after the enactment of Section 1106 (a) of the Revenue Act of 1926, while in the other cases the tax was paid before the enactment of that section.

4. The court below, in effect, held unconstitutional Section 612 of the Revenue Act of 1928, which, in plain language, repealed Section 1106 (a) of the Revenue Act of 1926 as of the date of its enactment. A final decision of this question is of great importance in securing the orderly administration of the taxing statutes. The question affects many pending assessments involving substantial sums of money.

5. The decision of the court below is, we submit, inconsistent with the decisions of this Court in *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *United States* v. *Heinszen & Co.,* 206 U. S. 370; *Campbell* v. *Holt,* 115 U. S. 620.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
*Solicitor General.*

OCTOBER, 1930.

## BRIEF IN SUPPORT OF PETITION

### OPINIONS BELOW

The opinion of the District Court (R. 8–12) is reported in 33 F. (2d) 135. The opinion of the Circuit Court of Appeals (R. 16) is reported in 42 F. (2d) 214.

### JURISDICTION

The order of the Circuit Court of Appeals affirming the judgment of the District Court was entered on July 9, 1930. (R. 17.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether the respondent is deprived of the right it would otherwise have had to recover taxes collected after the statutory period of limitations had expired, because it executed a bond conditioned upon the payment of the taxes in question.

2. If the respondent's action is not barred because of its execution of the bond, whether Sections 607, 611, and 612 of the Revenue Act of 1928 should be construed to prevent its recovery.

3. Whether the sections, if so construed, are constitutional.

### STATUTES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides in part:

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

(U. S. C. App., Title 26, Sec. 1249.)

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provides in part:

SEC. 607. *Effect of expiration of period of limitation against United States.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

(U. S. C. Supp. III, Title 26, Sec. 2607.)

SEC. 611. *Collections stayed by claim in abatement.*—If any internal-revenue tax (or any interest, penalty, additional amount or addition to such tax) was, within the period of limitation properly applicable thereto,

assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

(U. S. C. Supp. III, Title 26, Sec. 2611.)

SEC. 612. *Repeal of section 1106 (a) of 1926 act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

(U. S. C. Supp. III, Title 26, Sec. 2612.)

## STATEMENT

The facts are sufficiently stated in the petition.

## ARGUMENT

We contend that the collection complained of by respondent was justified because of the bond which it executed at the time when it filed its claim in abatement. (R. 5.) The decision of the Circuit Court of Appeals on this point is apparently in conflict with that of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370, where it was held that a suit by the United States upon a bond conditioned upon a payment of a tax was not barred by the statute of limitations relating to the collection of the tax. The decision of the court below is also apparently in conflict with that of the Court of Claims in

*Mascot Oil Co.* v. *United States,* 42 F. (2d) 309. In that case it appeared that the taxpayer had made a cash deposit in a bank in escrow to guarantee the payment of a tax, and the court, relying on the decision of this Court in the *Barth case,* held that the collection after the statutory period for the collection of the tax was justified by reason of the deposit. The *Mascot Oil case* is now pending before this Court on a petition for certiorari (No. 400, October Term, 1930) which is not opposed by the Government.

It is true that the bond involved in the *Barth case* was executed pursuant to the provisions of paragraph 14(a) of Section 234(a) of the Revenue Act of 1918, while the bond involved in the instant case was not required or prescribed by any particular statute. But the reasoning of this Court in the *Barth case* does not appear to depend upon the particular statutes in question and we submit that the *Barth case* and the instant case are not substantially distinguishable in this regard. The bond in the instant case appears to have been a valid obligation. If the taxpayer had refused to pay and if the Government could have succeeded in an action on the bond, it would seem clear that the taxpayer, by paying, could not acquire the right to recover the payment and avoid liability on the bond.

The respondent's position is supported by two decisions of the Board of Tax Appeals (*Shaffer* v. *Commissioner,* 12 B. T. A. 298, and *Gulf States*

*Steel Co.* v. *Commissioner*, 12 B. T. A. 1244), but these cases were decided by the Board before the decision of this Court in the *Barth case*.

If the taxpayer's action is not barred because of its execution of the bond, the questions involved in the instant case are substantially the same as those in *Wyman, Partridge & Co.* v. *United States,* decided by the Court of Claims, in which petition for certiorari has been filed in this Court, No. 416, October Term, 1930, and the same argument is applicable. The instant case differs from the *Wyman, Partridge & Co. case* only in the fact that the instant case was instituted by a suit in the District Court against a Collector of Internal Revenue, while the other case was a suit against the United States in the Court of Claims. We submit that this difference should not lead to a different decision.

If the respondent could not recover otherwise, the fact that the suit was brought prior to the enactment of the Revenue Act of 1928 does not give a right of recovery. A cause of action given by statute may be taken away at any time by a repeal of the Act creating it, and the result of such repeal is to abolish the right of action itself, even though it is then involved in suit. The bringing of suits vests in a party no right to a particular decision. *Flanigan* v. *Sierra County,* 196 U. S. 553, 560; *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226.

Respondent's right to recover the taxes in controversy is purely statutory. "Few governments have conceded such a right on any condition." *Cheatham* v. *United States*, 92 U. S. 85, 89. Even if respondent had been entitled to a recovery prior to the enactment of the Revenue Act of 1928 by reason of a favorable construction of Section 1106 (a) of the preceding Revenue Act, nevertheless, the enactment of Sections 607, 611, and 612 of the Revenue Act of 1928 was a proper withdrawal by the United States of its consent that the taxes might be recovered by reason of a statute of limitation. Ever since the decision of *Collector* v. *Hubbard*, 12 Wall. 1, it has been recognized that actions against Collectors to recover taxes paid are statutory proceedings. *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Arnson* v. *Murphy*, 115 U. S. 579, 584; *Schoenfeld* v. *Hendricks*, 152 U. S. 691. The decision of the court below that this suit could be maintained notwithstanding the action of Congress in withdrawing its consent that such a statutory suit might be prosecuted is in conflict with the foregoing decisions and particularly with the declaration of this Court in *Collector* v. *Hubbard*, 12 Wall. 1, 14:

> Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer can not have any vested right in the remedy granted by Congress for the correction of an error in taxation.

## CONCLUSION

It is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
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CLAUDE R. BRANCH,
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OCTOBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 508

# In the Supreme Court of the United States

OCTOBER TERM, 1930

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

*v.*

ERIE COAL & COKE COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## SUPPLEMENTAL MEMORANDUM IN BEHALF OF PETITIONER

# In the Supreme Court of the United States

OCTOBER TERM, 1930

---

No. 508

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-third District of Pennsylvania, petitioner

*v.*

ERIE COAL & COKE COMPANY

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**SUPPLEMENTAL MEMORANDUM IN BEHALF OF PETITIONER**

Petitioner neglected to mention, either in the petition or in the supporting brief, the case of *Roberts Sash & Door Company* v. *United States,* 38 F. (2d) 716, No. 97, in this Court, present term (certiorari denied October 13, 1930). In that case, as in the instant case, the taxpayer filed a claim in abatement, accompanied by a surety bond conditioned upon the payment of any additional tax found to be due. After the statutory period for the collection of the tax had expired the Collector demanded payment of an additional assessment. The taxpayer paid this under protest, and the surety bond was released. The Court of Claims held that the taxpayer could not recover the amount paid. The case is, consequently, squarely in conflict with

the decision of the Circuit Court of Appeals in the instant case.

The United States opposed the petition of Roberts Sash & Door Company, and our brief (filed on July 19, 1930) stated that there was no conflict of decisions. We did not realize that the decision of the Circuit Court of Appeals in *Heiner* v. *Erie Coal & Coke Company* involved the point in question. The opinion in that case was handed down on July 9, 1930, after the preparation of the first draft of our brief in the *Roberts case*. The opinion in the *Heiner case* does not mention the point, but it does necessarily decide it, as it is in the case and was argued to the court.

We are sending to counsel for the Roberts Sash & Door Company a copy of this memorandum, with a statement that we will not oppose a motion for reconsideration of his petition for certiorari if he sees fit to file such a motion.

Respectfully submitted.

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OCTOBER, 1930.

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No. 508

# In the Supreme Court of the United States

OCTOBER TERM, 1930

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

*v.*

ERIE COAL & COKE COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

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# In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 508

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-Third District of Pennsylvania, petitioner

*v.*

ERIE COAL & COKE COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the District Court (R. 8-12) is reported in 33 F. (2d) 135. The opinion of the Circuit Court of Appeals (R. 16) is reported in 42 F. (2d) 214.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 9, 1930. (R. 17.) The petition for certiorari was granted November 24, 1930.

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

The respondent herein filed a claim in abatement of an assessment of additional taxes for the year 1917, which claim was rejected after the expiration of the statutory period for collection. Thereafter the respondent filed a new claim in abatement, accompanied by a bond conditioned upon the payment of any part of the additional taxes found by the Commissioner of Internal Revenue to be due. The claim in abatement was later allowed in part, and the remainder was paid by the respondent under threat of distraint after the expiration of the statutory period for collection and after the enactment of the Revenue Act of 1926. Suit for recovery of the tax so paid was entered in the lower court before the enactment of the Revenue Act of 1928, but the case was tried and judgment was rendered after the enactment of that Act. The questions presented are:

1. Whether the execution of the bond by the respondent deprived it of the right to recover back the taxes collected after the statutory period of limitation for collection had expired.

2. If respondent's execution of the bond does not preclude recovery, whether Section 611 of the Revenue Act of 1928 should be construed to have such effect.

3. Whether Section 611, if so construed, is constitutional.

## STATUTES INVOLVED

The statutes involved are contained in the Appendix, *infra*, pp. 17–21.

## STATEMENT

Respondent's tentative income and excess-profits tax return for the calendar year 1917 was filed April 1, 1918, and its completed return was filed June 11, 1918. (R. 9.) The tax assessed thereon was paid. In March, 1921, the Commissioner of Internal Revenue assessed an additional tax against respondent for the year 1917 in the sum of $133,252.97. (R. 9.) This assessment was made within the period of limitations. On May 4, 1921, respondent filed as to this additional assessment, a claim in abatement, which was rejected on March 15, 1924. Subsequently, on May 31, 1924, the respondent filed a new claim in abatement to the additional assessment, pursuant to which the assessment was reduced by the sum of $67,546.90 and the balance of the claim for abatement in the sum of $65,706.07 was rejected on March 23, 1926. (R. 9 as explained by stipulation of counsel.) On April 20, 1926, pursuant to notice of distraint, petitioner collected from respondent the balance of $65,706.07. (R. 9.) On April 27, 1927, respondent filed with petitioner a claim for refund of the additional tax collected. The Commissioner of Internal Revenue has not acted upon the claim for refund. (R. 9.)

When respondent filed its claim in abatement on May 31, 1924, the claim was accompanied by a bond conditioned upon the payment by respondent of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment of the sum of $65,706.07, at which time another bond was substituted for it, conditioned upon the payment of interest which is not in issue here. (R. 9, as explained by stipulation of counsel.) The first bond was executed by respondent and a surety in the penal sum of $325,000 and contained the following recitals and conditions (R. 6–7):

> Whereas, the above-bounden principal has been assessed income-profits taxes for the year 1917 and claims that the whole portion thereof has been illegally assessed against it and desires to file a claim for the abatement thereof, and further desires that the collection of the amount covered by said claim for abatement be deferred until such time as that claim has been finally determined by the Commissioner of Internal Revenue; and
>
> Whereas, in case such claim is filed payment of the amount of tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany its claim with a bond in double the amount of the tax covered by the claim, with surety satisfactory to the Commissioner of Internal Revenue, conditioned for the pay-

ment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double the amount of tax covered by such claim for abatement;

Now, therefore the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the Commissioner of Internal Revenue to be due, with interest at the rate of one (1%) per cent and (½%) per cent per month from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

This suit to recover the additional tax paid was instituted in the District Court of the United States for the Western District of Pennsylvania on April 24, 1928. The Revenue Act of 1928 became a law on May 29, 1928. (R. 1.) After that date the case was tried. (R. 4.) The District Court on February 6, 1929, entered judgment for the respondent for $65,706.07 with interest. (R. 13.) This judgment was affirmed by the Circuit Court of Appeals. (R. 17.)

## SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In not holding that recovery of the amount in suit was barred because of the execution of a bond conditioned upon payment of the tax.

2. In holding that the provisions of Section 611 of the Revenue Act of 1928 did not preclude a refund or recovery of the amount in suit in this case.

3. In refusing to recognize the power of Congress to specify the conditions under which a recovery may be had of moneys paid to or collected by the United States as taxes.

4. In not holding that Section 1106 (a) of the Revenue Act of 1926 was retroactively repealed by Section 612 of the Revenue Act of 1928.

5. In affirming the judgment of the District Court in favor of the respondent.

## SUMMARY OF ARGUMENT

### I

By reason of its act in filing a bond with its second claim in abatement, the respondent is prevented from recovering the amounts paid on the ground that the statute of limitations had run against collection at the time such payment was made. The reasoning of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370, when applied to the instant case precludes such recovery. The bond was respondent's contract that it would pay the amount found due by the Commissioner. The fact that the bond given herein was not provided for by statute as in the *Barth case* does not change the result. It none the less represented an unqualified promise to pay and the statute of limitation should not be held to be a defense to a promise which was not subject to the statute. The

fact that the bond was not given until after the period for collection had expired is immaterial. The original liability was not extinguished at the time the contract was made and such liability was sufficient consideration for the new promise to pay.

II

Even if the filing of the bond does not prevent recovery, the case comes within the terms of Section 611 of the Revenue Act of 1928, which presents an effective defense to the suit. The validity of Section 611 as a defense with respect to facts similar to those in the instant case is argued in the briefs for the government in *Graham and Foster* v. *Goodcell*, No. 36, October Term, 1930, and *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, which are now before the Court. Counsel for the respondent herein have been furnished with the Government's briefs in those two cases, and to avoid repetition the petitioner here refers to the arguments therein.

**ARGUMENT**

I

BY EXECUTING A BOND CONDITIONED UPON THE PAYMENT WITH INTEREST OF ANY PART OF THE 1917 TAXES FOUND BY THE COMMISSIONER TO BE DUE, THE RESPONDENT IS PRECLUDED FROM RECOVERING SUCH TAXES ON THE GROUND THAT THEY WERE BARRED BY THE STATUTE OF LIMITATIONS AT TIME OF PAYMENT

An additional tax in the amount of $133,252.97 was assessed against the respondent within the proper period for assessment. Part of this assess-

ment was collected by the petitioner after the statute of limitations had run against collection and at a time when the Revenue Act of 1926 was in effect, Section 1106 (a) of which provided in part that the bar of the statute of limitations against the United States in respect of any internal-revenue tax should not only operate to bar the remedy but should extinguish the liability. (P. 20, *infra*.) It is apparent, therefore, that, except for the bond and the statute hereinafter mentioned, the petitioner would have the right to recover the taxes so collected upon the ground that such collection was barred by the statute of limitations.

On May 4, 1921, the respondent filed a claim for abatement of the additional assessment; this was rejected March 15, 1924. Subsequently, on May 31, 1924, the respondent filed a new claim in abatement. This claim was accompanied by a bond executed by the respondent and a surety, reciting that it was desired to postpone collection of the amount covered by the claim until such time as that claim should finally be determined by the Commissioner and conditioned upon the payment by the respondent, on notice and demand by the collector, of any part of such tax found by the Commissioner of Internal Revenue to be due, with interest from the time such tax would have been due had no such claim been filed. The tax was paid while the bond was in effect. It is the petitioner' position that by reason of the respondent's filing of this bond it can

not now recover on the ground that at the time of collection the statute of limitations had run or that its liability was extinguished.

In *United States* v. *John Barth Co.*, 279 U. S. 370, the Commissioner had assessed income and profits taxes against the Barth Company for the year 1919. That company filed claims for abatement of a portion of the taxes assessed, and, in consideration of the Government's refraining from the collection of such portion, executed a bond, binding it and its surety to pay on notice and demand by the collector any part of such tax found by the Commissioner to be due with interest from the time such tax would have been due had no such claim been filed. After the enactment of the Revenue Act of 1926 and after the expiration of the statutory period of limitation for collection, the Commissioner allowed part of the claim and requested payment of the balance from the taxpayer and its surety. Upon their failure to pay, the United States entered suit on the bond. The Barth Company demurred to the petition on the ground that the statute of limitation for collection had run. This Court held that the statute of limitations did not apply to the right to collect taxes found to be due arising from the contract under the bond, and said (p. 376):

> To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily

> to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax, but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

The instant case differs from the *Barth case* in that (1) in that case the bond was one provided for by statute, while here the bond was not; (2) in that case the bond was given before the statutory period for collection had expired, while here it was given after the expiration of that period; and (3) in that here there is no suit on the bond itself but the taxpayer has paid the amount without suit. We submit that nevertheless the respondent here is precluded from any recovery based on the running of the statute of limitations.

(1) The fact that the bond in the *Barth case* was provided for by statute does not affect the application of that decision to the instant case. Cf. *United States* v. *Linn*, 15 Pet. 290; *United States* v. *Hodson*, 10 Wall. 395. A bond given for the security of the Government, which is not in violation of law, may be valid though no statute directs its delivery. *Moses* v. *United States*, 166 U. S. 571, 586. Cf. *Findlay* v. *United States*, 225 Fed. 337, 345. It is not apparent that this Court in deciding the *Barth*

*case* intended to stress the specific form of contract which was made.

(2) Nor is it material that the bond in this case was given after the statute of limitations for collection had run.[1] The contract was supported by consideration. At the time the bond was executed the liability for the tax had not been extinguished. The mere running of the statute of limitations against collection did not have such effect. *Campbell* v. *Holt*, 115 U. S. 620; *Campbell* v. *Haverhill*, 155 U. S. 610, 618. The original debt is a sufficient consideration for a subsequent new promise to pay made either before or after the bar of the statute is complete. *Shepherd* v. *Thompson*, 122 U. S. 231, 235. Moreover, in addition to the fact that the moral obligation is a sufficient consideration for a valid promise, it is apparent that the respondent received a real benefit in the allowance of more than one-half of its claim. If, as the Government contends in *Stange* v. *United States*, No. 23, present Term, and the cases heard immediately after it, a waiver of collection of a tax executed by the taxpayer after the statutory period has run is valid, it would seem to follow that a bond conditioned on payment of the tax is valid, even though executed after the statutory period for collections has expired.

---

[1] In *United States* v. *E. Hogshire, Son & Co.*, 37 F. (2d) 720 (E. D. Va.), it was held that suit might be maintained on a bond given after the statute had run. *United States* v. *Drew*, decided September 28, 1929 (S. D. N. Y.), unreported, is *contra*.

(3) We submit that it is immaterial that the taxpayer paid the amount in dispute because of a threat of distraint and not as the result of a suit on the bond. If, as we contend above, the bond was a valid promise to pay the amount found due, it gave the Government a right independent of any right to collect the tax as such. On these assumptions, if suit had been brought on the bond, the statute of limitations would not have been a defense. *United States* v. *John Barth Co.*, 279 U. S. 370, *supra*. If the taxpayer was liable under the bond it could not, by paying the tax as such and obtaining cancellation of the bond, restore itself to the position in which it would have been if no bond had been given. And if the respondent was liable to make the payment in question under the bond, the fact that the Government collected by threat of distraint gives the taxpayer no right to recovery. The arguments in behalf of the taxpayer just suggested were overruled in *Austin Co.* v. *Commissioner of Internal Revenue*, 35 F. (2d) 910 (C. C. A. 6th) certiorari denied, 281 U. S. 735; and in *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, in which a review of this point was denied by this Court, although certiorari was granted as to another point. 281 U. S. 717. See also *Champ Spring Co.* v. *United States*, 38 F. (2d) 988 (E. D. Mo.).

*Roberts Sash & Door Co.* v. *United States*, 38 F. (2d) 716 (C. Cls.), pending on certiorari before this Court as No. 97, present Term, is in point.

There the court refused to allow a taxpayer to recover an amount which had been collected ~~as a tax~~ after the time for collection expired, because of the fact that a bond conditioned on the payment of the tax was outstanding. ~~The only possible distinction between that case and the instant case is that~~ In the *Roberts case* the bond was given before the period for collection expired. Cf. *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309 (C. Cls.), pending before this Court on certiorari as No. 400, present Term.

We conclude, therefore, that the respondent may not now use the fact that the statute had run as a means for recovering a payment which the respondent had, by contract, bound itself to make.

## II

SECTION 611 OF THE REVENUE ACT OF 1928, WHEN PROPERLY CONSTRUED, EFFECTIVELY PRECLUDES RECOVERY HEREIN BY THE RESPONDENT AND, AS SO CONSTRUED, IS CONSTITUTIONAL

Neither the District Court nor the Circuit Court of Appeals expressed any opinion as to the effect of the bond given by the respondent. Both courts held that since the sum was illegally collected it could be recovered by the respondent and that Section 611 of the Revenue Act of 1928 did not furnish the petitioner with a defense against recovery. The petitioner contends that even if it should be held that the execution of the bond did not prevent a

recovery of the amount paid out of time, nevertheless the facts of this case bring it clearly within the terms of Section 611 of the Revenue Act of 1928 and that that section is a complete and effective defense to the suit herein. Section 611 (p. 21, *infra*) provides in substance that if a tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed with or without bond and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of the Act) should not be considered as an overpayment under the provisions of Section 607 of the Act, relating to payments made after the expiration of the period of limitation on assessment and collection.

In the instant case the tax was assessed in time and before June 2, 1924. Claims in abatement were filed, and the collection was stayed until after the second claim was finally decided. This collection was made before the enactment of the Revenue Act of 1928. With regard to the application of Section 611, these facts are similar to those in *Graham and Foster* v. *Goodcell*, now before this Court, No. 36, present term. In that case the collector as respondent contends that Section 611 was intended to prevent repayment of any amounts which had been assessed within time and prior to June 2, 1924, and where a claim in abatement had been filed and col-

lection stayed. The argument for the collector in the *Graham and Foster case* is applicable to the position of the collector as petitioner in the instant case. There are only two points of difference between this case and the *Graham and Foster case,* aside from the question of the bond, which is not there present.

The first difference is that the claim in abatement herein was not rejected until after the statute had run; hence there is no room for argument here that, since the collector had a period of time after the claim was rejected within which he might collect, Section 611 does not apply.

The other question is whether Section 611 is applicable and, if applicable, is constitutional in view of the fact that the taxes were collected during the life of Section 1106 (a) of the Revenue Act of 1926 (p. 20, *infra*) providing that the bar of the statute of limitations should not only operate to bar the remedy but should extinguish the liability. This question is fully argued in the brief for the United States in *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, which is to be heard immediately preceding the instant case. The respondent herein has been supplied with copies of the Government's brief in the *Graham and Foster* and the *Wyman, Partridge & Co. cases.* To avoid repetition of the entire argument contained in those cases we refer the Court to the briefs filed for the Government therein.

## CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER, 1930.

# APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not effect suits or proceedings begun at the time of the passage of this Act: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 299:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. Title 26, Sec. 1057.)

SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C. Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment

made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C. Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 113:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court began before the en-

actment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App., Title 26, Sec. 1062.)

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App., Title 26, Sec. 1249.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C. Sup. III, Title 26, Sec. 2611.)

SEC. 612. REPEAL OF SECTION 1106 (A) OF 1926 ACT

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C. Sup. III, Title 26, Sec. 2612.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

DEC 10 193

No. 508.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA,
*Petitioner,*

*vs.*

ERIE COAL AND COKE COMPANY.

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.**

## BRIEF FOR THE RESPONDENT.

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*vs.*

ERIE COAL AND COKE COMPANY.

---

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.**

---

## BRIEF FOR THE RESPONDENT.

---

## SUMMARY OF ARGUMENT.

I.

The filing of bond with the claim in abatement does not prevent the respondent's recovery:

(1) The bond does not constitute a waiver of the Statute because waiver is a matter of in-

tention and all the circumstances clearly negative any such intention. Among such circumstances are (a) the fact that at the time the bond was given the Statute of Limitations was generally conceded not to be applicable, (b) in this case there were two claims in abatement filed, the first without a bond, the second three years later accompanied by a bond, and when the second claim was filed the Statute had already run, and (c) the Statute which enacted the limitation provision, itself provided the method by which it could be waived, which method was not pursued in this case.

(2) The bond was filed for the sole purpose of security and of guaranteeing the collector against the possibility of the subsequent insolvency of the taxpayer. It was not the giving of the bond that delayed collection, but the filing of the claim in abatement; the bond was incidental, and the contemporary procedure clearly shows that the filing of a claim in abatement was just as effective in staying collection of the assessment, whether or not it was accompanied by a bond.

(3) The case of United States vs. John Barth Co., 279 U. S. 370, relied upon by the petitioner does not support the petitioner's contention.

## II.

Even if Section 611 of the Revenue Act of 1928 is a valid enactment it was not intended to affect cases such as this, wherein payment was exacted not only after the Statute of Limitations had become a bar but after the liability itself had been extinguished by the express statutory provision of Section 1106 (a) of the Revenue Act of 1926.

(2) If Section 611 is construed so as to apply to a case such as this, it becomes unconstitutional because in conflict with the Fifth Amendment.

## ARGUMENT.

### I.

### RESPONDENT IS NOT PRECLUDED FROM RECOVERING BY REASON OF HAVING EXECUTED A BOND CONDITIONED ON PAYMENT OF ANY PART OF THE 1917 TAX FOUND BY THE COMMISSIONER TO BE DUE.

1. *The Bond filed with the Claim in Abatement does not constitute a waiver of the Statute of Limitations.*

We have purposely used the word "waiver" in the above heading because if we correctly view this matter, it is the principle of waiver that is here involved. Counsel for the Petitioner in presenting their argument say that by the giving of its Bond, the Respondent "is precluded", or "is barred", or "is prevented" from using the bar of the Statute of Limitations in aid of its recovery. In order to be so "precluded," or "barred," or "prevented" either the doctrine of estoppel or voluntary waiver must operate. The necessary elements of an estoppel are of course not present so if the Respondent is precluded from raising the question of the Statute of Limitations, it was because it has voluntarily waived the benefit of its provisions.

In approaching this question, it is well to consider the situation as it was when this Bond was given; because waiver is very largely, if not entirely, a matter of intention, and such intention would be evidenced if at all at the time the act was done.

The tax here involved is a tax for the year 1917 and the assessment was made therefor in March, 1921. The limitation on collection was first enacted in

Section 250 (d) of the Revenue Act of 1921, 42 Stat. 227, as follows:

> "* * * And no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war-profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

From the time this Act was passed until the decision of this Court in the case of *Bowers vs. New York and Albany Lighterage Co.*, 273 U. S. 346, decided on February 21, 1927, it was practically universally believed that the collection of a tax by distraint was not a "suit or proceeding", under Section 250 (d) of the Revenue Act of 1921 and that therefore such collections were not affected by the statutory limitation of five years. As is stated in the Government's Brief in the case of *Graham and Foster vs. Goodcell* (now before this Court at No. 36):

> "* * * The Treasury Department held that taxes assessed within the five-year period could be collected by distraint at any time and that a suit in court was the only proceeding for collection that was barred after the five-year period. I. T. 1446 I-2, Cumulative Bulletin (July-Dec., 1922), p. 218. This being the position of the Treasury Department, the practice of delaying collection upon the filing of claims for abatement developed. Upon the filing of a claim for abatement the collection of any additional tax was deferred until the taxpayer could have a hearing and an opportunity to present facts in opposition to the assessment. In a great many cases this practice delayed the collection until after the five-year period had expired. On February 21, 1927,

this Court rendered its decision in Bowers v. N. Y. & Albany Co., *supra,* holding that collection by distraint was a 'proceeding' within the meaning of Section 250 (d) of the Revenue Act of 1921 and that such collection was barred thereby after five years. This case finally established that the view of the Treasury Department was erroneous and that a great many of the collections theretofore made had been barred."

The point we seek to make is this:

When the Bond in the present case was given, to-wit, on May 31, 1924, the idea of waiving the Statute of Limitations thereby, was not in the mind of anybody concerned because at that time it was generally conceded that the Statute was not applicable.

Again, as bearing on the question of the purpose and intent of this Bond, it is to be noted that in the present case there were two claims in abatement filed. The first was filed on May 4, 1921, and was not accompanied by Bond; this was before the Statute of Limitations had run, and it will not be contended that this had the effect of waiving the Statute. This first claim in abatement was rejected on March 15, 1924. The five year limitation on collection had expired in the interim. On May 31, 1924, a new claim in abatement was filed which was accompanied by the Bond in question. At this time, as above stated, the Statute had run and if, as we contend, the question of intent is material, we respectfully submit that no intent to waive the Statute can possibly be gathered from this course of conduct.

Still another reason why the Bond with the claim in abatement is not a waiver of the Statute of Limitations, is the fact that the Act itself, which estab-

lished the limitation, specifically provided how it could be waived. The provision is as follows:

> "Sec. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, *unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax;* * * *" (Italics ours.)

These consents in writing or waivers as they are called, were frequently employed, but no such consent in writing was entered into in the present case (R. 6). The Bond is obviously not the consent in writing referred to in the Statute. The Board of Tax Appeals has definitely so ruled in two cases, *C. B. Shaffer vs. Commissioner*, 12 B. T. A. 298, and *Gulf States Steel Company vs. Commissioner*, 12 B. T. A. 1244.

2. *The purpose of the Bond was a single purpose, viz: to insure to the collector the solvency of the taxpayer.*

It is to be remembered that this Bond was neither required nor authorized by any statutory provision.

Whether or not a Bond was required with a claim in abatement was a matter personal with the particular collector. He required a bond or not in accordance with his individual estimate of the financial reliability of the taxpayer. As the Board of Tax Appeals said in the *C. B. Shaffer* Case above stated, 12 B. T. A. 289, 301:

> "* * * We cannot escape the conclusion that the instrument is what it says it is, a bond, given to the collector of internal revenue to indemnify that collector if she should not be able to collect any amount held to be legally due and payable. Collectors of internal revenue receive from the Commissioner of Internal Revenue assessment lists against taxpayers in their districts. Upon the receipt of such a list, the collector becomes liable, personally, for the collection of the taxes shown. To emphasize that personal responsibility, the United States requires of each collector of internal revenue a bond, running to the United States, conditioned (in part) upon collection of the taxes shown upon the assessment lists received. If the taxes are uncollectible the collector may make a claim for credit of such amount and the approval of such claim relieves the collector of personal responsibility. * * * When the relation of the collector to the scheme of Federal taxation is kept in mind, it seems clear that the bond in this proceeding was taken by the collector to protect against personal responsibility, and was her own private affair. * * *."

The giving of a Bond therefore, had nothing to do with the Statute of Limitations, and perhaps what is more important, *the giving of a Bond was not what delayed the collection of the tax.* The filing of a claim

in abatement was just as effective for that purpose if no Bond accompanied it. We wish to stress this point because the position is taken in Petitioner's Brief, quoting from the *John Barth Company case*, 279 U. S. 370:

> "The taxpayer has obtained his object by the use of the Bond and he should not object to making good the contract by which reason he obtained the delay he sought."

In our case, the taxpayer did not obtain his object by the use of the Bond, and we repeat that under the practice that obtained, the filing of the claim in abatement was just as effective in delaying collection whether or not it was accompanied by a Bond. In this connection, we again refer to the Government's Brief in the Graham and Foster case (p. 10 *et seq.*), where it is argued that the filing of a claim for abatement, "with or without bond," *stayed* the collection of the tax so as to make Section 611 of the Revenue Act of 1928 applicable. The following excerpts from said Brief are enlightening:

> "* * * The Treasury Department held that taxes assesssed within the five-year period could be collected by distraint at anytime and that a suit in court was the only proceeding for collection that was barred after the five-year period. I. T. 1446 I-2, Cumulative Bulletin (July-Dec., 1922), p. 218. This being the position of the Treasury Department, the practice of delaying collection upon the filing of claims for abatement developed. *Upon the filing of a claim for abatement the collection of any additional tax was deferred* until the taxpayer could have a hearing and an opportunity to present facts in opposi-

tion to the assessment. In a great many cases this practice delayed the collection until after the five-year period had expired. * * *"

Quoting from the Report of the Committee on Ways and Means:

"Taxpayers were frequently permitted to file claims in abatement with the Collector *and thus delay* the collection until the claims in abatement could be acted upon * * *.

"The Ways and Means Committee Report, *infra*, p. 48, states, in part (p. 34):

"Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the Collector and *thus delay the collection* until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. (Italics ours.)

"The Report of the Finance Committee of the Senate, *infra*, p. 49, states, in part (p. 42):

"Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the *collection delayed* by the filing of a claim in abatement, * * *. (Italics ours.)"

Quoting from the opinion of the District Court in *Reeves vs. Anderson*, P. H. Tax Ser. Vol. I, 1930, par. 1383:

"* * * Section 611 of the Act of 1928, by its express terms, is applicable, irrespective of whether or not a bond accompanied the claim. Moreover, while the Act of 1918 was the only

statute prior to 1924 which made provision for a claim and formal stay, the Commissioner of Internal Revenue has had authority to abate or refund taxes illegally assessed throughout the period under review. See 26 U. S. C. A. Sec. 149, historical note. And pursuant to statutory authority, the Commissioner, with the approval of the Secretary of the Treasury (fol. 39), promulgated regulations which included provisions for the filing of claims in abatement. In none of them, however, was the execution of a bond required, or was there a mandatory provision that collection must be stayed pending decision on the claim in abatement. On the contrary, it was provided that the filing of a claim in abatement did not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized by the running of the statute or otherwise. See Article 261, Regulation 33; Article 1032, Regulation 45; Article 1032, Regulation 62; cf. *United States v. Burden, Smith & Co.* (C. C. A.), 33 F. (2d) 229, 230. Under these regulations the collector had authority to postpone the collection of the tax pending the determination of the claim for abatement, unless, in his judgment, such action would jeopardize the ultimate collection of the tax. Postponement was the common practice where there was no doubt as to the solvency of the taxpayer; in many cases the period of the statutory bar on collection expired before the decision on the claim in abatement had been rendered. * * *"

In view of this argument by which the Government supports its position with reference to Section 611, it is submitted that it cannot single out the Erie Coal and Coke Company and say that in its case, it was the filing of the Bond that delayed the collection of

the tax and not the claim in abatement. The fact of the matter is that the collection in this case would have been delayed to the same extent if this claim in abatement had been filed without a Bond and just as it had previously been delayed by the filing of the first claim in abatement in 1921.

3. *The case of United States vs. John Barth Company*, 279 U. S. 370, *does not support Petitioner's contention.*

We believe that Counsel for the Petitioner has misconstrued the decision of the Court in the Barth Company case, and we submit that that case is no authority here for the following reasons:

(a) The bond in the Barth case was required to be filed by the specific provisions of a particular Statute, which Statute likewise prescribed its effect.

The Section of the Act under consideration in the Barth case was Paragraph 14 (a), Sec. 234 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which provides:

> "At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss * * * resulting from any material reduction * * * of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. *In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond.* * * *"
> (Italics ours.)

This was the only Statutory provision relative to Bonds. In fact it was also the only Statutory provision relative to claims in abatement. Claims in abatement in general were permitted by departmental regulations only, and these regulations did not require the giving of a bond.

This Section of the 1918 Act then, deals with a very limited class of taxpayers, *i. e.*, those who had sustained a substantial loss resulting from any material reduction of the value of the inventory for 1917, or from actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In that limited class of cases, the Act specifically provided that the taxpayer should file a Bond with his Claim in Abatement, and that when this was done "payment of the amount of the tax covered by such claim shall not be required until the claim is decided."

We submit that all that the Court decided in the Barth case was that proceedings under Section 14 (a) aforesaid constituted an exception to the operation of the limitation of five years created by Section 250 (d) of the Revenue Act of 1921. After quoting Section 250 (d), the opinion proceeds:

> "Section 250 (d) refers to a failure of the Commissioner of Internal Revenue to pass upon the return made by the taxpayer and to assess the tax. It is the determination preceding the assessment that is referred to in that section. If there is no determination and assessment within five years after the return is made, or after the return should have been made, then the statute bars an assessment and the collection of the tax due. But section 250 (d) does not apply to the

> proceeding under paragraph 14 (a), which relates to a case in which there is a return with a resulting assessment, as there was here, and the taxpayer seeks to reduce the assessed tax by representing a claim for an abatement of part of it, and to avoid the collection of that part, pending action on the claim for abatement, by giving a bond. In this case there was a return and there was an assessment, but the bond was given well within the five years after the return, and when the bond was given it required the obligees, if the abatement was not allowed, to pay interest from the time such tax would have been due, had no such claim been filed. In other words, the limitation of section 250 (d) has no application to a situation following a claim of abatement and the giving of bond." (In accordance with the provisions of paragraph 14 (a).)

It is to be remembered in this connection that with reference to claims in abatement in general, the regulations provided,

> "the filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund." Art. 1032. Reg. 62.

The present case, therefore, presents a very different situation from that dealt with in the Barth case, where the Act of Congress specifically provided that when that particular type of claim in abatement was filed with the Bond, "payment shall not be required until the claim is decided."

(b) *In the Barth case the suit was on the Bond itself which the Court held was an independent undertaking.*

In the Barth case, the United States brought a common law action against the principal and surety on the Bond. With reference to this, the opinion of the Court is:

> "The plain purpose of paragraph 14 (a) was to affect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the Bond. * * * The making of the Bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had * * *"

In our case, there is no suit on the Bond, nor could there have been, because there was never any default under the Bond. Its condition was that certain payment would be made and when that payment was made, the Bond was automatically extinguished. The fact that the Bond had been given, however, did not enlarge nor diminish the tax liability. Its purpose, as we have endeavored to show, was merely to provide security for payment. It is the tax liability with which we are here concerned, and the question of whether or not this Bond created an enforceable obligation for a liability independent of the tax liability, is not involved. Even if this were a suit on the Bond, our contention would be that there was no liability. The condition of the Bond is, "if the principal shall * * * pay any part of *such tax* found by the Commissioner of Internal Revenue to be due", etc. After the enactment of 1106 (a) of the Revenue Act of 1926, there was no *such tax*. Any

tax that may have previously existed, was by that Act completely extinguished and, consequently, any finding by the Commissioner that such a tax was due, was a nullity. (The Revenue Act of 1926 became a law on February 26, 1926, and the finding of the Commissioner in this case was made on March 31, 1926.) However, as stated above, this question is not involved. This is not a suit on the Bond. It is a suit to recover a payment illegally exacted *as a tax liability* when no liability existed—a payment exacted under threat of distraint, (R. 5) and which would have been exacted in just the same fashion if there had been no Bond. We respectfully submit that the decision in the John Barth Company case does not support the Petitioner's contention.

For a similar reason the decision of the Court of Claims in the case of *Mascot Oil Company vs. United States*, 47 F. 2nd 309, is distinguishable. In that case, instead of a bond, the taxpayer deposited the money in a bank in escrow which, as far as the taxpayer was concerned, was tantamount to actual payment. The other feature that distinguishes that case from this, will be noted in the following from the Opinion:

> "* * * The collection was not made on the ground that a tax was due, but was based on a valid contract to pay a certain amount when it was determined by the commissioner. The tax fixed the sum to be paid, but the payment and collection was by virtue of the contract and not by reason of the tax liability, and the payment therefore cannot be recovered by plaintiff * * *."

## II.

## SECTION 611 OF THE REVENUE ACT OF 1928 DOES NOT PRECLUDE RECOVERY.

### (a) Section 611 Does Not Apply to Taxes Collected After the Running of the Statute of Limitations, and During the Time Section 1106 (a) of the Revenue Act of 1926 was in Force.

When the payment of $65,706.07 was exacted by plaintiff from defendant on April 20, 1926, under the guise of additional income and excess profits taxes for the year 1917, collection was barred by the existing statute of limitations, and, furthermore, no liability of any kind running to the Government against the plaintiff on account of 1917 income and excess profits taxes existed in view of the provisions of Section 1106 (a) of the Revenue Act of 1926 then in force. That section of the law, which was enacted February 26, 1926, provided that the bar of the statute of limitations against the United States *should not only operate to bar the remedy, but should extinguish the liability.* When the collection was made, therefore, not only was the Collector without authority to collect, but any liability that may have existed had been completely extinguished.

Section 611 of the Revenue Act of 1928 provides that certain payments made under conditions described therein shall not be considered as overpayments under the provisions of Section 607, relating to payments made after the expiration of the period of limitations. The title of Section 607 is "Effect of Expiration of Period of Limitations against the United States", and it provides that any tax assessed

or paid after the expiration of the period of limitations properly applicable thereto shall be considered an overpayment, and shall be credited or refunded if claim therefor is filed within the period of limitation for filing such claim.

It will be observed that Section 611 prescribes the following requisites to bring a case within its terms:

(1) Assessment of an internal revenue tax within the period of limitation properly applicable, and prior to June 2, 1924.
(2) Claim in abatement.
(3) Stay of collection, and
(4) Payment of such part as may have been stayed before or within one year after the enactment of the 1928 Act.

At the time of the enactment of that law there were two classes of taxpayers who might be affected by the enforcement of this section. The difference between the classes is due to difference in the time of the payment mentioned in the requisite numbered (4) in the preceding paragraph. These classes may be described as follows:

(1) Those who made payments after the running of the statute of limitations, and prior to the enactment of the Revenue Act of 1926.
(2) Those who made payments after the running of the statute of limitations, while the Revenue Act of 1926 was in effect.

It might seem from the language of Section 611 that there is a third class, *i. e.*, those who made payments after the running of the statute of limitations within one year after the enactment of the Revenue Act of 1928. But Congress deliberately refused to

authorize such collections, (See Report of Conference Committee, *Infra*, p. 39, and statement of Representative Garner, *Infra*, p. 40), and in a public announcement issued on July 27, 1928, Mimeograph 3660, VII-2C. B., page 82, by Acting Commissioner H. F. Mires, it was stated that Sections 607 and 611 do not authorize the Bureau to enforce collection of a tax in any case after the expiration of the period of limitation, but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto. This one year provision was obviously left in Section 611 purely through oversight. At any rate it is admittedly inoperative because collection cannot be enforced from the class to which it refers.

The second class referred to above are in a different situation from those in the first class, because their payments were made at a time when, by express statutory enactment contained in Section 1106 (a) of the Revenue Act of 1926, all liability was extinguished. That section was more than a statute of limitations. In any case to which it properly applied it completely extinguished any liability that may have existed, and rendered null and void any assessment previously made by the Commissioner. *The situation was as if no liability had ever existed.*

A payment which otherwise meets the requisites of Section 611, made while the 1926 Act was in force, is not merely a payment made after the running of the statute of limitations; it is not merely a payment made when there was a liability against the taxpayer running to the Government which the Commissioner and Collector could not enforce because of the ex-

piration of the period of limitations; it is a payment made when by express statutory provision there was no liability whatever. It seems reasonable to conclude, therefore, that Congress, in enacting Sections 607 and 611, *which by their terms refer only to payments made after the running of the statute of limitations*, did not intend to include payments made which Section 1106 (a) of the Revenue Act of 1926 was in force.

The language of the report of the Ways and Means Committee of the House (page 49 of Respondent's Brief in the Graham and Foster case No. 36) clearly shows that the intent of the provisions under discussion was merely to withdraw the defense of the statute of limitations and not to re-create a dead liability. The report states, *inter alia*:

> "Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the tax-payers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, *and merely withdraws the defense of the statute of limitations.*

The adjudicated cases involving the narrow question present in the instant case are few. On some of the questions involved in the cases now before your Honorable Court, for instance the meaning of the word "stay", and whether or not Section 611 applies to a common law suit against a collector, the decisions of the lower courts are not in accord. These questions have been presented in the other cases and we shall not re-argue them here. There is no lack of accord, however, with respect to the narrower ques-

tion presented by this case and by the Wyman Partridge Company case No. 416. In all the other cases with the exception of these two the payment by the tax-payer had been made prior to February 26, 1926, the effective date of the 1926 Act. That being so, in each of those cases at the time payment was made *the liability still existed although collection was barred by the statute of limitations.* In the case at Bar payment was made on April 20, 1926, *at which time no liability of any sort existed*, the liability, if any, having been extinguished by Section 1106(a) of the Revenue Act of 1926. This we submit presents a very different situation and a situation that is not now before this Court in any of the other cases except the Wyman Partridge Company case.

In every case in which the lower courts have dealt with situations where the liability had been extinguished by Section 1106(a) of the Revenue Act of 1926 the decisions have sustained the position upon which we here rely, namely, that Section 611 does not affect those cases and that the retroactive repeal of Section 1106(a) does not and cannot re-create the debt liability.

*Clinton Iron & Steel Co. v. Heiner*, 30 F. (2nd) 542 (W. D. Pa.)

*Pepsin Syrup Co. v. Schwaner*, 35 F. (2nd) 197 (S. D. Ill.)

*Diamond Alkali Co. v. Heiner*, 39 F. (2nd) 643 (W. D. Pa.)

*Dobbins v. Commissioner*, 31 F. (2nd) 935 (C. C. A. 3rd)

*U. S. V. Wyman Partridge Co.*, 41 F. (2nd) 886 (Ct. Cls.)

*Southern Lumber Co. v. U. S.*, (W. D. Ark. Rep.

in Prentice Hall, Fed. Tax Service 1930, Vol. 1, Section 1836).

*Wettengel v. Robinson*, 300 Pa. 355.

In the *Clinton Iron & Steel Company* case the Court said (pp. 544-545):

> "Congress may, under certain circumstances, ratify an erroneous collection of tax retroactively. *United States v. Heinszen & Co.*, 206 U. S. 370, 27 S. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Rafferty v. Smith, Bell & Co.*, 257 U. S. 226, 42 S. Ct. 71, 66 L. Ed. 208. The situation in the case at bar, however, is not that of the cases cited. In the instant case the tax was collected by the defendant, as collector of internal revenue, at a time when existing statutory law declared that not only was the right of collection barred, but that the liability had been extinguished. * * * If it (Section 611) has any retroactive force, it is in respect to a demand upon the United States for the return of an amount voluntarily paid, and not in connection with a personal suit theretofore brought against a collector of internal revenue to recover an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

In the Pepsin Syrup case, the Court said (p. 8691):

> "The tax here sought to be recovered and the right to recover it was barred by Section 1106 (a) of the Revenue Act of 1926 before it was paid under duress by the taxpayer. That statute not only barred the remedy but extinguished the obligation of the taxpayer to pay. The fact that Section 612 of the Revenue Act of 1928 repealed Section 1106 (a) of the Revenue Act of 1926 'as of the date of its enactment' is of no avail to defendants in this case. It was not within the power

of Congress to enact legislation to recreate the liability extinguished by the operation of Section 1106 (a), *supra*. *United States v. John Barth Co.*, 27 Fed. (2d) 782-784; *United States v. John Barth Co.*, 279 U. S. 370 (49 S. Ct. 366, at D-9230, herein); *William Danzer & Co. Inc. v. Gulf & Ship Island R. R. Co.*, 266 U. S. 635; 17 R. C. L. 674."

In the Dobbins case, the Court said (p. 937):

"Section 1106 of the act of 1926 (26 USCA 1249, note) provides that the bar of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability. Therefore, if the United States did have a just claim against Emily M. Dobbins in respect of any tax before the statute ran against it, the liability was absolutely extinguished in 1926 when the United States was seeking to recover it and the repeal of the section by the act of 1928 (45 Stat. 874) did not revive a dead liability or create a new obligation."

In the case of *Southern Lumber Company vs. U. S.*, the Court said:

"Section 612 of the Revenue Act of 1928 attempts to repeal Section 1106 (a) of the Revenue Act of 1926, as of its effective date. After the passage of Revenue Act of 1926 and before the passage of the Revenue Act of 1928, the plaintiff paid the taxes in question. Its rights accrued as of the date of payment. Section 1106 (a) plainly extinguishes the liability by positive enactment; and collection was had when the obligation no longer existed in law. Not only had the remedial statute of limitations expired, but the very essence of the obligation was destroyed. The at-

tempt of Section 612 of the Revenue Act of 1928 to revive claims already barred and extinguished would unconstitutionally deprive the taxpayer of property without due process of law. Congress has no power to re-create a liability once extinguished. United States v. Barth, 27 F. (2d) 782 (this question not passed on by the Supreme Court in United States v. Barth, 279 U.-S. 370); Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197. In Danzer v. Gulf R. R., 268 U. S. 633, the Supreme Court said:

> 'Where under the Interstate Commerce Act, the lapse of time for presenting claims against railroads to the Interstate Commerce Commission not only bars the remedy, but destroys defendant's liability, the giving of the provision of the Transportation Act that the period of Federal Control should not be computed as a part of the limitation period a retroactive effect, so as to revive claims already barred, would unconstitutionally deprive defendant of property without due process of law.' "

The case of *Wettengel v. Robinson*, 300 Pa., 355, was decided by the Supreme Court of Pennsylvania on May 12, 1930. The question arose in the State Courts because the United States had presented a tax claim against a Pennsylvania Corporation which was in the hands of statutory liquidators. With regard to the question here involved that Court said:

> "To meet this difficulty (the effect of Sec. 1106 (a) of the Revenue Act of 1926) the government points to section 612 of the Revenue Act of May 29, 1928, which provides that 'Section 1106 (a) of the Revenue Act of 1926, is repealed as of February 26, 1926,' that is, as of the date of its passage. Undoubtedly that provision would be effec-

tive as to all taxes the liability for which had not been extinguished prior to the passage of the Act of 1928, but would it as to those where it had? The court below, relying on Dobbins v. Commissioner of Internal Revenue, 31 Fed. (2d) 935, decided it would not. In construing section 612, it was there said that it 'did not revive a dead liability or create a new obligation.' The same conclusion was reached in United States v. John Barth Co., 27 Fed. (2d) 782; Erie Coal & Coke Co. v. Heiner, 33 Fed. (2d) 135, and Pepsin Syrup Co. v. Schwaner, 35 Fed. (2d) 197. True, the first of these cases was reversed in United States v. John Barth Co., 279 U. S. 370, but the Supreme Court expressly refused to pass upon the government's contention that the Act of 1928 'restores and gives life to the tax retrospectively.' A search fails to disclose any opinion by the Supreme Court of the United States, or by any federal circuit court of appeals, which reaches a different conclusion from that of the court below. Campbell v. Holt, 115 U. S. 620, relied on by the government, decides simply that a statute which limits the time within which suit may be brought, may be repealed, although, in the particular case under consideration, the statutory limitation had run before the repealing statute was passed. Its effect as a precedent has been limited, however, to cases where the repealed statute was purely one of limitation. On this point see William Danzer & Co. v. Gulf and Ship Island R. R. Co., 268 U. S. 633, where Campbell v. Holt is distinguished, and it is held that if a statute both creates the liability and limits the time within which suit may be brought, the limitation cannot be repealed after the right to sue has been lost, because (page 637) the 'effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment.'

It is not necessary to consider this point fur-

ther, for we are clearly of opinion that another principle of law stands as an effectual bar to the government's claim. The provision quoted from section 612 of the Act of 1928, is retrospective, but the important question is as to the extent thereof. In Union Pacific R. R. Co. v. Laramie Stockyards Co., 231 U. S. 190, 199, it is said: 'The first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature" '. This rule must be of at least equal application when determining the scope of legislation admittedly retrospective in some degree. The justice is not less obvious in such cases, and hence a statute 'which interferes with antecedent rights (must fail in its attempted application to a particular case, unless the language used shows that such was) the manifest intention of the legislature.' No such language appears here. There is not the slightest hint of an intention to reopen cases like the present, where the liability had been wholly extinguished. On the contrary, as the government's brief advises us, the expressed reason, appearing in the report of both the 'senate and house committees proposing the 1928 Revenue Act,' was because 'Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax, or for

> the making of a refund or credit, or the bringing of a suit for refund.' The utmost effect which can be given to that reason,— and it is the only one of which we have been advised,—is that when making settlements in the future the government shall not be hampered by the 'doubtful questions' which bothered it in the past. Certainly it cannot justly be construed to give life to the taxes we are now considering, which were irrecoverable before even the Act of 1926 was passed."

On reason and authority, therefore, we are entirely justified in concluding that Section 611 of the Revenue Act of 1928 cannot be construed as attempting to include within its provisions those cases wherein payment was exacted *after* liability was extinguished by Section 1106 (a) of the Revenue Act of 1926 and while that Act was in effect.

This construction does not necessitate declaring Sections 611 and 612 of the Revenue Act of 1928 unconstitutional and is, therefore, consistent with the rule of construction that requires a statute to be construed so as to avoid unconstitutionality if at all possible.

**(b) Section 611 is not a Retroactive Ratification of an Illegal Collection, Nor a Re-Levy of an Extinguished Tax Liability.**

The petitioner must, of course, concede that there is no language in the 1928 Act which expressly ratifies an illegal collection. If the provisions under consideration are to be construed as a retroactive ratification of an illegal collection it must be because such a meaning is implied from the language used. We submit, however, that there is nothing in the provisions

from which such an implication could be drawn, and the legislative history which petitioner has set forth in its brief indicates no such purpose.

In the report of the Ways and Means Committee the following appears:

> "Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that *the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations.* If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment."

Obviously this statement could not apply to payments made while Section 1106 (a) of the Act of 1926 was in force because that section expressly extinguished all liability. A payment exacted when there was not the slightest semblance of a liability cannot be regarded as an amount properly due and the statement that these provisions merely withdrew the defense of the statute of limitations, obviously, could not be applied to a situation such as presented in this case.

It is recognized that Congress may, under certain circumstances, levy a tax retroactively. This Court has so held in *United States v. Heinszen & Company*, 206 U. S. 370, 27 S. Ct. 742; *Rafferty v. Smith, Bell & Company*, 257 U. S. 226.

The situation presented to the Court in those cases,

however, is clearly distinguishable from that existing in the case at bar. There collections were made under a defective law which Congress later specifically ratified and legalized. Those cases had to do with tariff duties which had been collected in the Philippine Islands by virtue of Presidential Proclamation which was later held not to be sufficient authority. Congress then passed an act which provided:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two * * * are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed."

The Court held that since Congress had the power to authorize or impose the tax originally it could ratify an erroneous collection, and there is no question of the soundness of that decision.

In the present case, however, Congress has not undertaken to ratify an erroneous collection. The language of the statute cited above from the Heinszen case clearly demonstrates that when Congress undertakes to ratify an erroneous collection of tax it does so in no uncertain language, and it has certainly not done so in Section 611 of the Revenue Act of 1928.

Furthermore, it must not be forgotten that we have here a case of a collection made when any liability that may have existed had *by express statutory declaration been extinguished.* If it had been the intent

of Congress to recreate this liability by re-levying the tax would it not be reasonable to expect the statute to commence with, "There is hereby levied a tax * * *", or some other equally appropriate language?

We submit that the levying of a tax by inference is an unheard of proposition, but that is precisely where petitioner's argument leads.

**(c) Section 611 is not the Withdrawal of a Privilege Previously Granted Which Permitted the Sovereign as a Matter of Grace to be Sued.**

In the first place this is not a suit against the sovereign but is an action against an individual. It is an action for money had and received and is of common law origin; Elliott v. Swartwout, 10 Peters, 137; Bend v. Hoyt, 13 Peters, 263.

Counsel for petitioner contends that it is no longer a common law action but that the common law action has inferentially been superseded and that the same type of action is now inferentially statutory. Passing this argument for the moment and assuming that this is so, the fact remains that this right of action against a Collector has existed substantially since the beginning of the Government, and if it had been the purpose of Congress to take it away or restrict it in any respect, we should naturally expect that purpose to be expressed. Of course, no such purpose is expressed nor even remotely suggested by Section 611 and 612 of the Revenue Act of 1928.

A history of the statutory enactments may be of some benefit in this connection:

Unquestionably the right of a citizen to sue a collector of internal revenue for duties illegally exacted from him is of common law origin. The form of the

action was assumpsit for money had and received. The principle of law upon which the action was based is that applicable to agents in private transactions, that is, that a voluntary payment to an agent without notice or objection will not subject the agent who shall have paid over to his principal to any responsibility, but that payment accompanied by notice or with protest against the illegality of the demand, does create a liability on the part of the agent who shall pay over to his principal in spite of such notice or protest. *Elliott v. Swartwout*, 10 Peters 137; *Bend v. Hoyt*, 13 Peters 263.

Prior to 1833 the action had to be instituted in a State court, the Federal courts being without jurisdiction in such cases except where the parties were citizens of different states and the requisite jurisdictional amount was involved. The act of March 2, 1833, ch. 57 (4 Stat. 633) permitted an original action against the collector in the Federal courts, and also permitted a collector sued in a State court to have the case removed to the Federal court.

Most of the litigation respecting illegal collections before the Civil War period had to do with customs, there being only two periods when internal revenue laws were in force, viz., from 1792 to 1802 and from 1813 to 1817.

Under the exigencies created by the Civil War a number of internal revenue laws were enacted, and it became a question whether the general provisions of the Act of 1833, giving jurisdiction to the Federal Courts of cases under revenue laws, extended to cases under the new enactments. This question was resolved by the internal revenue act of June 30, 1864, ch. 172 sec. 50, (13 Stat. 241) which provided that the

provisions of the Act of 1833 should extend to all cases arising under the laws for the collection of internal duties.

The Act of July 13, 1866, Sec. 68, (14 Stat. 172) however, repealed the fiftieth section of the Act of June 30, 1864, and had the effect of restoring the pre-existing situation with respect to personal suits against collectors for recovery of internal taxes, that is, the Federal courts had original jurisdiction only on the ground of diversity of citizenship and where the requisite jurisdictional amount was involved, and it was necessary to resort to the old practice of starting the action in a State court, subject to the right of the collector to remove the case to a Federal court under Section 643, Revised Statutes. See *Cincinnati Brewing Co. v. Bettman*, 102 Fed. 16, citing *Ins. Co. v. Ritchie*, 5 Wall. 541; 18 L. ed. 540; *City of Philadelphia v. Collector*, 5 Wall. 720, 18 L. ed. 614; *Collector v. Hubbard*, 79 U. S. 8, 20 L. ed. 272; *Vinal v. Improvement Co.*, 34 Fed. 228; *Crawford v. Hubbell*, 89 Fed. 1.

The Judicial Code enacted by the Act of March 3, 1911, ch. 231, 36 Stat. 1087, provided in Section 24, paragraph fifth, that the district courts should have original jurisdiction of all cases arising under any law providing for internal revenue, thus restoring the right of action against collectors in the District Courts.

The Act of March 3, 1887, known as the Tucker Act, Ch. 359, 24 Stat. 505, vested the Court of Claims with jurisdiction over suits against the United States founded on claims arising under any law of Congress, except for pensions, and the district and circuit courts were given concurrent jurisdiction of such claims not

exceeding $10,000.00. By Section 1310 of the Revenue Act of 1921 and Section 1310 of the Revenue Act of 1924, the jurisdiction of the district and Circuit Courts was enlarged to include suits against the United States for the recovery of internal revenue taxes, even if the claim exceeds $10,000.00, where the Collector by whom such taxes were collected is dead or out of office at the time the suit or proceeding is commenced.

These provisions authorizing suits against the United States are supplementary to the right of the taxpayer to pursue his remedy against the Collector, which remedy never was specifically granted by statutory enactment.

The common law action against the collector was modified by the Act of March 3, 1863, Ch. 76, Sec. 12 (12 Stat. 741), which became Section 989 R. S. and is now Section 842, Title 28 United States Code. This section provides that no execution shall issue against the Collector or other officer, but the amount recovered shall upon final judgment be provided for and paid out of the proper appropriation of the Treasury, if the Court certifies that there was probable cause for the act done, or that he acted under the directions of the Secretary of the Treasury, or other officer of the Government. It was further modified by the Act of July 13, 1866, Ch. 184, Sec. 19 (14 Stat. 152) which later became Section 3226 R. S. and is now Section 156, Title 26 United States Code. This law required that before bringing such an action a claim for refund should be filed with the Collector of Internal Revenue.

Despite the alterations in the common law remedy, the action is nevertheless still regarded as a personal

one, and it is in no sense an action against the United States. This was definitely held by the Court in *Sage v. United States,* 250 U. S. 33.

The personal nature of the action was again recognized by the Supreme Court in *Smietanka v. Indiana Steel Company,* 257 U. S. 1. In that case the court held that a suit to recover taxes cannot be maintained against the successor to the Collector to whom the taxes were paid. Other cases to the same effect are *Roberts v. Lowe,* 236 Fed. 604; *Philadelphia, etc. v. Lederer,* 242 Fed. 492; *Detroit Hotel Company v. Brady,* 275 Fed. 995.

In the case of *Smietanka v. Indiana Steel Company,* cited above, the Court said:

> "To show that the action still is personal, as laid down in *Sage v. United States,* 250 U. S. 33, 37, 39 Sup. Ct. 415, 63 L. Ed. 828, it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case."

From the foregoing it is apparent that the system of corrective justice by which a taxpayer has a right of action against a Collector of Internal Revenue for the recovery of an internal revenue tax erroneously or illegally exacted, and by which a judgment recovered by him may in effect be converted into a judgment against the United States if the Court issues a certificate of probable cause has been in operation for more than half a century. The petitioner contends that by Sections 607 and 611 Congress amended or modified the various provisions of law which make up this corrective system so as to preclude the re-

covery in this case. There is, however, no repeal or modification of these provisions by express reference, and if Sections 607 and 611 do repeal the long standing provisions of law upon which this system is based, it must be because these sections, when read with the earlier laws, are found to be so repugnant that the conclusion is unavoidable that Congress intended to modify or repeal the earlier law. There is no express reference to any provision of the Judicial Code respecting suits against Collectors of Internal Revenue, nor to Section 989 R. S. by which it is provided that if the Court issues a certificate of probable cause the amount recovered, shall upon final judgment, be paid out of the proper appropriation of the Treasury. If Congress had intended to modify these sections it seems reasonable to infer that it would have used some definite language indicating such an intent.

We, therefore, conclude that Section 611 was not intended to be the withdrawal by the sovereign of its consent to be sued.

Furthermore, even if this provision could possibly be construed as a withdrawal by the sovereign of its consent to be sued it could not properly be construed as a withdrawal of such consent in respect to payments exacted after the enactment of Section 1106 (a) of the Revenue Act of 1926. In this respect the argument hereinbefore made under point II (a) is equally applicable here.

**(d) As construed by the Government, Section 611 is unconstitutional.**

We have, in the foregoing, set forth the grounds upon which we rely to support our contention that

the provisions of the Revenue Act of 1928 were not intended to and do not apply to this case. If we are correct in this position, the question of constitutionality does not arise, but assuming, without admitting, that these provisions were intended to apply to this case, we are met at once with the question, did Congress have the power under the Constitution to enact these provisions.

This question has been answered in the negative in the following cases hereinbefore cited, (p. 20):

*Clinton Iron & Steel Co. vs. Heiner*, 30 F. (2nd) 542 (W. D. Pa.).
*Pepsin Syrup Co. vs. Schwaner*, 35 F. (2nd) 197 (S. D. Ill.).
*Diamond Alkali Co. vs. Heiner*, 39 F. (2nd) 643 (W. D. Pa.).
*Dobbins vs. Commissioner*, 31 F. (2nd) 935 (C. C. A. 3rd).
*U. S. vs. Wyman Partridge Co.*, 41 F. (2nd) 886 (Ct. Cls.).
*Southern Lumber Co. vs. U. S.*, (W. D. Ark.) Report in Prentice Hall, Fed. Tax Service 1930, Vol. 1, Sec. 1836.
*Wettengel vs. Robinson*, 300 Pa. 355.

Counsel for the Government state in their Brief, in the Wyman Partridge Co. case, that although the power of Congress to affect rights between individuals is limited by the Fifth Amendment, there is no such limit regarding claims against the Sovereign. We beg to call attention to the fact that this Court has expressly recognized that a retroactive tax law may be so arbitrary and capricious as to offend the fifth amendment. In *Nichols v. Coolidge*, 274 U. S. 531, the Court held that Section 402 of the Revenue

Act of 1918, so far as it required that there should be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after death, was arbitrary, capricious and amounted to confiscation, and, therefore, was unconstitutional. In the opinion in that case, by Mr. Justice McReynolds, it was said:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24, 36 S. Ct. 236, 60 L. Ed. 493; L. R. A. 1917 D. 414; Ann. Cas. 1917 B. 713; *Barclay & Co. v. Edwards*, 267 U. S. 442, 450, 45 S. Ct. 135, 348, 69 L. Ed. 703. See also *Knowlton v. Moore*, 178 U. S. 41, 77, 20 S. Ct. 747, 44 L. Ed. 969."

Let us examine the facts in the present case and see if the application of the provisions of the Revenue Act of 1928, considered as an enactment imposing a tax on the affected persons, or, what amounts to the same thing, as a law ratifying an illegal collection, is so arbitrary and discriminatory as to amount to confiscation of vested property of the affected persons, contrary to the fifth amendment.

In the case at bar the statutory period for collection of additional taxes for 1917 expired not later than June 11, 1923. While there is good authority for the view that the running of the bar of the statute of limitations in itself extinguishes the liability, we may concede that it did not do so. It may be admitted that the law imposing the tax did not make

liability to the tax conditional upon assessment and collection within the statutory period, and that the expiration of the statute of limitations did not discharge the liability. In the Revenue Act of 1926, however, Congress by express declaration contained in Section 1106 (a) extinguished all liability. The situation was as if no tax had ever been imposed. The affected taxpayer was no longer to be considered as delinquent in payment of a liability running to the Government. He was in the eye of the law no different from any taxpayer who paid his tax in full. So far as Federal taxation was concerned he was entitled to rest secure in his right to hold and retain all of his property, subject only to the power of Congress subsequently to enact a valid taxing statute applying to all citizens without discrimination.

If the provisions of the Revenue Act of 1928 are viewed as an imposition of a tax on the affected persons, it is arbitrary, discriminatory and capricious and amounts to confiscation of the property of the affected persons contrary to the Fifth Amendment. As applied to the plaintiff it represents a tax on income and profits realized in the calendar year 1917. More than ten years elapsed between the transactions taxed, and the imposition of the tax. While the Court has, in some instances, recognized retroactive income tax laws as valid, it has never passed on a case where the law attempted to base a tax on transactions that took place ten years before the attempted levy.

There is another reason why this legislation is so discriminatory and its classification so arbitrary as to render it unconstitutional, and this particular

reason has not been mentioned in the adjudicated cases; it becomes apparent when the legislative history is examined. This legislative history shows that when the 1928 Act was being considered, Congress was confronted with this situation, brought to a head by the decision of the Supreme Court in the New York & Albany Lighterage case: Taxes imposed under prior revenue acts, totalling approximately $100,000,000. were barred by the statutes of limitations. Of this total amount $30,000,000. had been collected unlawfully and $70,000,000. still remained uncollected. This was the only difference between the persons affected. Those who had paid were seeking refunds and those who had not paid were resisting payment. Under the bill as first drafted the $30,000,000 already collected was to be kept and the $70,000,000 was to be collected in the future. The legislative history then shows that the Senate had stricken Section 611 as originally drawn from the bill, that in conference the House conferees endeavored to get the Senate to recede, and that a compromise was reached, by which the provision authorizing the collection of the $70,000,000.00 was omitted from the bill, there being some doubt about its constitutionality, and that the provisions retaining the $30,000,000.00 already collected was agreed to. The discrimination is obvious. A tax was to be imposed on certain persons who had paid, and others who had been successful in postponing collection were not to be taxed. Has Congress the power, under the guise of a law taxing income, to so discriminate between classes of citizens? It is submitted that the effect of this legislation, if it be considered as the retroactive imposition of a tax, is precisely

the same as though Congress had said, "A tax is hereby imposed on the $30,000,000 class. The $70,000,000 class is excused." If this does not constitute discrimination, it is difficult to imagine a situation that does.

The legislative history will be found in the appendix to the Government's Brief in the Graham and Foster case, No. 36 (pp. 45 to 51).

House Report No. 2, 70th Congress, 1st Session, Ways and Means Committee Report reads:

> "SEC. 611. COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.
>
> "Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. *Accordingly, it is of utmost importance to provide that the payments already made*

*should not be refunded. In order to prevent inequality it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act."*

The Senate Committee refused to agree and the following report shows the compromise reached:

"STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE.

"Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. *The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection.*"

The figures above given are taken from the following quotation from the Appellant's Brief in this case in the Circuit Court of Appeals:

"Section 611 of the new Act, as proposed by the House of Representatives, went further than

the Section in the Act as finally passed by Congress. An explanation in dollars and cents of the effect of the Section, as originally proposed, and also as finally enacted, appears in the debates in the House of Representatives in a statement by the ranking Democratic member of the Ways and Means Committee, Mr. Garner, of Texas (Congressional Record, Volume 69, page 10136), as follows:

"* * * It meant $30,000,000 refund of taxes and $70,000,000 to be collected in the future from taxpayers. That was the basis of the $100,000,000 loss. When we got into conference we could not get the Senate to recede. We finally tied up on two questions—the furniture outfit and 611. I believe in telling how we do these things. We tied up on them. We wanted the Senate to recede from both, but they did not want to recede because some particularly selfish people were going to get the money. We do not believe in that, but the Senate does. The result is that we compromised. We made it 'original,' and then we struck out subsection (b) of section 611, cutting out the $70,000,000 prospectively we were going to get, because there was some doubt about the constitutionality of it, and decided to keep the $30,000,000 that we had in the Treasury. That was the compromise between those two amendments, one of them cutting down and the other giving up the prospect of securing $70,000,000 in the future."

By this legislation then as finally enacted, Congress has undertaken to classify citizens standing in the same relation to the Government as taxpayers, and has penalized those who had already paid and exempted those who had not paid.

In *Blodgett v. Holden*, decided November 21, 1927,

and modified February 20, 1928 (275 U. S. 142, 276 U. S. 594), the Court had before it questions certified to it by the Circuit Court of Appeals for the Sixth Circuit, one of which related to the application of the Revenue Act of 1924 to gifts fully consummated before it was enacted.

An equal division of opinion among the eight justices who heard and considered the matter rendered it impossible categorically to answer the question certified, but it was announced per curiam that the statements of views by the Justices are enough to show that the tax exacted cannot be sustained.

In the statement by Mr. Justice McReynolds, in which the Chief Justice, Mr. Justice Van Devanter and Mr. Justice Butler concurred, it was said:

> "We must therefore determine whether Congress had power to impose a charge upon the donor because of gifts fully consummated before such provisions came before it. 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184.
>
> "In *Nichols v. Coolidge* (May 31, 1926), this court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment. As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.
>
> * * * * * * * *

> "So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment."

In the statement by Mr. Justice Holmes, in which Mr. Justice Brandeis, Mr. Justice Sanford and Mr. Justice Stone concurred, it was held, after stating the settled rule that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, the duty of the Court is to adopt that which will save the Act, that the Act was meant to operate only from its date and only to tax gifts thereafter made. It is significant, however, that the following statement was made:

> "If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. If I am right, we should read it in that way now."

The above statement is authority for the contention that we have heretofore made, namely, that as far as the present case is concerned, this Act can properly be construed to prevent its being declared unconstitutional. However, if it be construed to apply to the instant case, we confidently assert in view of the above, that the classification attempted to be made by the Act is so unreasonable, arbitrary and capricious as to offend against the provisions of the Fifth Amendment.

It is conceded that Congress has the power to grant certain exemptions in income tax laws, such as the exemption of incomes of single persons of less than $1,500 or incomes of husband and wife of less than $3,500, but such exemptions, to be valid, must be uniform. If the effect is to arbitrarily classify taxpayers occupying the same relation to the Government, and to tax one group and exempt the other, the law is not a valid exercise of the taxing power, and amounts to a confiscation without due process of law. That is the effect of the sections of the Revenue Act of 1928, if construed as imposing a tax on the affected persons or as ratifying an illegal collection. They divide persons occupying the same relation to the Government with respect to taxes imposed by prior revenue laws into classes, arbitrarily determined according to whether or not a payment has been made, and as construed by the Government, provide that one group shall be taxed, and the other exempted.

Whether the enactment of Sections 611 and 612 be considered as a retroactive imposition of a tax or the ratification of an unlawful collection, the conclusion is unavoidable that in order to accomplish the purpose contended for Congress had to recreate a dead liability. That this cannot be done is amply demonstrated by the case of *Danzer v. Gulf & Ship Island Railroad Co.*, 268 U. S. 633, 45 S. Ct. 612. That case was an action to recover reparations under an order of the Interstate Commerce Commission. The Interstate Commerce Act provided that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues." The claim had not

been filed within that period. There had been passed, however, Section 206 (f) of the Transportation Act which provided:

> "The period of Federal control shall not be computed as part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control."

If this latter Act was operative then the plaintiff's claim was filed in time. The Supreme Court held as follows:

> "Plaintiff's right to file his claim with the Commission had expired several months before the passage of the Transportation Act. But, if the period of Federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the Commission and had no cause of action. It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff. *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 666, 35 S. Ct. 444, 59 L. Ed. 774; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 642, 38 S. Ct. 408, 62 L. Ed. 914; *Kansas City Southern Ry. v. Wolf*, 261 U. S. 133, 139, 43 S. Ct. 259, 67 L. Ed. 571. On the expiration of the two-year period, it was as if liability had never existed. And this court, applying the rule of construction that all statutes are to be considered prospective unless the language is express to the contrary, or there is a necessary implication to that effect, recently has held that section 206 (f) does not apply to causes of action which were barred by

a state statute of limitations before the passage of the Transportation Act. *Fullerton Co. v. Northern Pacific*, 266 U. S. 435, 437, 45 S. Ct. 143, 69 L. Ed. 367.

Plaintiff suggests that the only period of limitations applicable to claims for reparation is that prescribed by section 16 (2), and argues that, as the period of Federal control exceeded two years, section 206 (f) must be construed retrospectively or given no effect.

We need not re-examine the doctrine of *Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained, and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (*The Harrisburg*, 119 U. S. 199, 214, 7 S. Ct. 140, 30 L. Ed. 358), and those arising under the Federal Employers' Liability Act, 35 Stat. 65,

c. 149, being Comp. St. Sections 8657-8665 (*Central Vermont Ry. v. White*, 238 U. S. 507, 511, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199, 201, 36 S. Ct. 75, 60 L. Ed. 226; *Kannellos v. Great Northern Ry. Co.*, 151 Minn. 157, 160, 186 N. W. 389; *Jones v. D., L. & W. R. R. Co.*, 96 N. J. Law, 197, 114 A. 331). See, also, *Davis v. Mills*, 194 U. S. 451, 454, 24 S. Ct. 692, 48 L. Ed. 1067. This case belongs to the latter class. Section 260 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive respondent of its property without due process of law in contravention of the Fifth Amendment. *Cf. Levy v. Wardell*, 258 U. S. 542, 544, 42 S. Ct. 395, 66 L. Ed. 758; *Forbes Boat Line v. Board of Commissioners*, 258 U. S. 338, 340, 42 S. Ct. 325, 66 L. Ed. 647; *Union Pacific R. R. v. Laramie Stock Yards*, 231 U. S. 190, 200, 34 S. Ct. 101, 58 L. Ed. 179; *Winfree v. Northern Pacific Ry. Co.*, 227 U. S. 296, 301, 33 S. Ct. 273, 57 L. Ed. 518."

## CONCLUSION.

To summarize:

1. On April 20, 1926, when payment was exacted from the respondent, not only had the statute of limitations on collection become a bar but the respondent's liability, if any, had been expressly extinguished.

2. When Congress two years later passed an act providing against refunds of taxes paid after the statute of limitations had run, it could not have been intended to affect cases like the present, wherein not only had the statute run but the liability itself had been extinguished. If such had been the intent

it would have been clearly expressed. This construction of the provisions of the act will eliminate constitutional questions from the case.

3. The provisions of the Act of 1928 in question do not in terms undertake to ratify an illegal collection, nor to reimpose an extinguished tax. If these provisions have this effect it is by inference alone and a tax cannot be imposed by inference. If Congress by the Act of 1928 did intend to re-impose an extinguished tax and thus revive a dead liability, the attempt to do so is a violation of the Fifth Amendment and unconstitutional:

(a) Because the reviving of a dead liability is tantamount to the taking of property without due process of law, and

(b) Because Congress did not attempt to revive the liability against all taxpayers alike and accordingly the Act as applied to respondent is so arbitrary and discriminatory as to amount to confiscation of respondent's property, contrary to the Fifth Amendment.

4. The filing of the bond with the claim in abatement did not constitute a waiver of the statute of limitations because:

(a) Admittedly the claim itself did not have such effect

(b) the only purpose of the bond was to insure payment if and when due,

(c) at the time the bond was given no limitation was recognized, and

(d) at the time the bond was given the statute of limitations had already run.

For the reasons above assigned it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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MASCOT OIL COMPANY, INCORPORATED, *v.* UNITED STATES.

UNITED STATES *v.* WYMAN, PARTRIDGE & COMPANY, INCORPORATED.

HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* ERIE COAL & COKE COMPANY.

CERTIORARI TO THE COURT OF CLAIMS AND THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 400, 416, and 508. Argued December 11, 1930.—Decided January 26, 1931.

Section 1106 (a) of the Revenue Act of 1926, provided, *inter alia*, that "The bar of the statute of limitations against the United

States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." *Held* that, whatever its proper construction, the fact that the taxes in question were collected while this section was in force, did not save claims for refunds from § 611 of the Revenue Act of 1928. See *Graham* v. *Goodcell, ante,* p. 409.

42 F. (2d) 309; 70 Ct. Cls. 246, affirmed.

41 F. (2d) 886; 70 Ct. Cls. 119, reversed.

42 F. (2d) 214, reversed.

CERTIORARI (see *post*) to review judgments in suits to recover moneys collected as income and profits taxes. In the first case the Court of Claims denied the claim; in the second it allowed it; and in the third a recovery in the District Court, 33 F. (2d) 135, was affirmed on appeal.

*Messrs. Theodore B. Benson* and *W. A. Sutherland* argued the cause, and *Mr. Benson* and *Mr. William Meyerhoff* filed a brief, for the Mascot Oil Company, Incorporated.

*Mr. Frank J. Albus,* with whom *Mr. William Meyerhoff* was on the brief, for Wyman, Partridge & Company.

*Mr. Robert A. Applegate,* with whom *Mr. H. B. McCawley* was on the brief, for the Erie Coal & Coke Company.

*Assistant Attorneys General Rugg* and *Youngquist,* with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch, Sewall Key,* and *Norman D. Keller,* Special Assistants to the Attorney General, and *Erwin N. Griswold, George H. Foster, Bradley B. Gilman,* and *H. Brian Holland* were on the briefs, for the United States and Heiner.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

These actions were brought to recover the amount of taxes alleged to have been illegally collected after the

expiration of the statutory period of limitation. The Government resists recovery under section 611 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875). In No. 400, *Mascot Oil Company, Inc.*, v. *United States*, the Government was successful. 42 Fed. (2d) 309. In No. 416, *United States* v. *Wyman, Partridge & Company*, 41 Fed. (2d) 886, and in No. 508, *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, 42 Fed. (2d) 214, the decisions below were in favor of the plaintiffs. This Court granted writs of certiorari.

In No. 400, *Mascot Oil Company, Inc.* v. *United States*, the taxpayer had made a deposit in escrow with a bank to cover the amount of the tax, but, when the collector demanded payment, it was made by the taxpayer under protest and not from the deposit. In No. 508, *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, a bond had been given to secure payment of the tax. The making of the deposit in the former case, and the giving of the bond in the latter, were after the statute of limitations had run, but the taxpayer in each case insists that the statute had not thereby been waived.

We may lay that question aside, for if there was no waiver these two cases, together with No. 416, *United States* v. *Wyman, Partridge & Company*, involved the same circumstances as those decided this day in *Graham* v. *Goodcell, ante*, p. 409, save that collections were made while section 1106 (a) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 113) was in force.[1] That section was repealed,

[1] This section provided: "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

as of the date of its passage, by section 612 of the Revenue Act of 1928 (45 Stat. 875). It is not necessary to attempt to resolve the questions raised by the ambiguous language of this section, as we are of the opinion that, from any point of view, it does not protect the taxpayers from the operation of section 611 of the Revenue Act of 1928. At the time the taxes were collected, there was no liability on the part of the taxpayers, but this was also true in the case of the petitioners in *Graham* v. *Goodcell, supra.* The Congress had constitutional authority in the circumstances set forth in section 611 of the Revenue Act of 1928 to cure the defect in administration which had resulted in the collection of the tax after the statute of limitations had run and to deny recovery to the taxpayers for the amount paid. The fact that section 1106 (a) of the Revenue Act of 1926 was in effect at the time of the collection is a distinction which does not affect the result.

No. 400, *Mascot Oil Company, Inc.,* v. *United States, judgment affirmed.*

No. 416, *United States* v. *Wyman, Partridge & Company, judgment reversed.*

No. 508, *Heiner, Collector of Internal Revenue,* v. *Erie Coal & Coke Company, judgment reversed.*